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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 548

H. V. B. SMITH, C. D. RAFFERTY AND H. S. McCORMICK, CO-PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF H. J. BAKER & BRO.,

APPELLANTS AND CROSS-APPELLEES,

versus

MOTORSHIP "FERNCLIFF" AND GLITTRE AKTIESELSKABET AND FEARNLEY & EGER,

APPELLEES AND CROSS-APPELLANTS.

CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
IN ADMIRALTY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Filed DEC 28 1938

United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 4385.

H. V. B. Smith, C. D. Rafferty and H. S. McCormick, co-partners trading and doing business under the firm name and style of H. J. Baker & Bro.,
Appellants and Cross-Appellees,

versus

Motorship "Ferncliff" and Glittre Aktieselskabet and Fearnley & Eger,
Appellees and Cross-Appellants.

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

Question certified to the Supreme Court of the United States by the Circuit Court of Appeals of the Fourth Circuit on the case stated.

Various questions have been raised by the appellants and cross-appellants in this case; but all but one of these have, in our opinion, been correctly decided by the court below for reasons adequately stated in the opinions of the District Judge. The remaining question, the extent of liability for cargo damage where the bill of lading contains a "true valuation" clause based on invoice cost, is one of such importance that, in view of division of opinion with regard thereto in this Court, we feel that it should be certified to the Supreme Court for decision:

STATEMENT OF FACTS.

This was a suit in admiralty to recover damages to shipments of fish meal made in March 1936 from points in Japan to consignees in Norfolk, Va. and Baltimore, Md. under bills of lading containing the following provision:

> "All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him.

The invoice cost of the fish meal was $32.50 per ton. The value of the damaged portion of the shipment upon arrival at the ports of destination was $25.00 per ton. The market value of undamaged fish meal at the ports of destination at the time of the arrival of the shipment was $36.00 per ton.

The court below held the valuation clause valid and computed the damages on the basis of the difference between the invoice cost ($32.50 per ton) and the value of the damaged fish meal at the time and place of delivery ($25.00 per ton).

Appellants, while not contending before us that the clause quoted is absolutely invalid, contend that in view of the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, its validity can be sustained only if it be construed as requiring that, in estimating damages, the percentage of loss on the damaged shipment be ascertained and applied to the invoice cost. Under this contention, the loss here would be determined, not by deducting the value upon arrival ($25.00 per ton) from the invoice cost ($32.50 per ton), but by ascertaining the proportion of the invoice cost ($32.50) corresponding to the proportion which the actual loss ($36.00—$25.00—$11.00) bears to sound value ($36.00), i. e. by

taking 11/36 of $32.50. It is pointed out that this is the method used in calculating the amount of loss under a valued marine insurance policy on cargo and also the method prescribed by rule 16 of the York-Antwerp rules for a general average adjustment. And it was stated at the bar of the court by counsel for appellant that the same method has been generally employed in estimating cargo damage since the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co., supra.*

In the absence of the decision in the Ansaldo San Giorgio case, we should affirm the decision below on the authority of *Gulf C. & S. F. R. Co.* v. *Texas Packing Co.* 244 U. S. 31, 37; *Penn R. Co.* v. *Olivet Bros.* 243 U. S. 574, 586; *Hart* v. *Penn R. Co.* 112 U. S. 331; *The Californian,* 2 Cir. 82 F. 2d 283; *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 2 Cir. 223 F. 600; and *The Oneida,* 2 Cir. 128 F. 687. In view of that decision, however, we are divided and in doubt as to the validity of such a clause as is here involved and as to the method which should be employed in computing damages under it. Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936, c. 229, sec. 4, 49 Stat. 1210, 46 USCA 1304(5), the question as to the correct method of computing damages under a valuation clause is deemed an important one, as to which an authoritative decision would seem desirable. We, therefore, respectfully certify to the Supreme Court of the United States the following questions of law as indispensable to a proper decision of this case:

QUESTIONS.

1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged

goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

JOHN J PARKER,
United States Circuit Judge.

MORRIS A. SOPER,
United States Circuit Judge.

H. H. WATKINS,
United States District Judge.

Dec. 19, 1938

Endorsed:

"Filed and Entered
Dec. 20, 1938,
Claude M. Dean, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit."

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the questions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on this 21st day of December, A. D., 1938.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

CLERK'S COPY.

AMENDMENT OF CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 548

H. V. B. SMITH, C. D. RAFFERTY AND H. S. McCORMICK, CO-PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF H. J. BAKER & BRO.,
APPELLANTS AND CROSS-APPELLEES,

versus

MOTORSHIP "FERNCLIFF" AND GLITTRE AKTIESELSKABET AND FEARNLEY & EGER,
APPELLEES AND CROSS-APPELLANTS.

CROSS-APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
IN ADMIRALTY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Filed JAN 16 1939

United States Circuit Court of Appeals

FOURTH CIRCUIT.

No. 4385.

H. V. B. Smith, C. D. Rafferty and H. S. McCormick, co-partners trading and doing business under the firm name and style of H. J. Baker & Bro.,
Appellants and Cross-Appellees,

versus

Motorship "Ferncliff" and Glittre Aktieselskabet and Fearnley & Eger,
Appellees and Cross-Appellants.

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore.

Amendment of Certificate heretofore made to the Supreme Court of the United States.

This cause coming on to be heard upon motion of appellees and cross-appellants to amend the statement of facts as contained in the certificate, it is ordered that the said statement be amended as follows:

(1) At the time the statement of counsel was made as appears on page three of the certificate the statement was challenged by opposing counsel and nothing appears in the record with regard thereto.

(2) The record shows that no value was declared by the shipper on the shipment in question.

(3) The record on appeal contains no assignment of error challenging the legal validity of the valuation clause in question, but the question was argued before the court on questions from the bench.

(4) The record shows that the damages in question were negligently caused.

JOHN J. PARKER,
United States Circuit Judge,
MORRIS A. SOPER,
United States Circuit Judge,
H. H. WATKINS,
United States District Judge.

Endorsed:

"Filed and Entered
Jan. 11, 1939
Claude M. Dean, Clerk."

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original amendment of certificate heretofore made to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Baltimore, Maryland, on this 14th day of January, A. D., 1939.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

Table of Contents.

	PAGE
Opinions Below	1
Jurisdiction	2
The Case Presented	2
Statement of the Case	3
Questions Certified	5
First Point:—The invoice value clause is invalid as an attempted limitation on the carrier's liability for negligence. The answer to the first question should be, no	5
Second Point:—The answer to the second question should be, no	25
Third Point:—The answer to the third question should be, yes	28
Appendix, Cummins Amendments	43

Table of Cases.

PAGE

Aetna Insurance Co. v. *United Fruit Co.*, 1938, 304 U. S. 430, 434 ..... 34, 38
Ansaldo v. *Rheinstrom*, 1935, 294 U. S. 494; 1933, 3 F. Supp. 579, 581 ..... 3, 4, 5, 6, 7, 8, 10, 11, 12 15, 17, 18, 20, 23, 25, 26, 27, 32, 42
Arnould on Marine Insurance 37, 40
Asuarca, The, 1924, 13 F. (2d) 222 17

Baltimore R. Co. v. *Oriental Oil*, 1908, 51 Texas C. A. R. 336 21
Bowman-Kranz Co. v. *Bush, Receiver*, 1920, 104 Neb. 165 ..... 18, 19
British Marine Insurance Act, 1906, Sec. 71(3) 36, 37
Brockman Co. v. *Mo. Pac. R. Co.*, 1916, 195 Mo. App. 607 18

Californian, The, 1936, 82 F. (2d) 283 ..... 15, 26
Chicago M. & S. Co. v. *McCaull-Dinsmore*, 1920, 253 U. S. 97 ..... 10, 11
Coleman v. *N. Y., N. H. & H.*, 1913, 215 Mass. 45 19

Davis, Director-General v. *Zimmern*, 1924, 211 Ala. 63 ..... 18, 19
Denver etc. R. Co. v. *Peterson Grocery*, 1915, 59 Colo. 125 18
Duplan Silk Co. v. *Lehigh Valley R. Co.*, 1915 223 Fed. 600 ..... 15, 17, 27, 32

Fahey v. *Baltimore & O. R. Co.*, 1921, 139 Md. 161 19
Ferncliff, The, 1938, 22 F. Supp. 728 ..... 1, 5, 25, 27, 28

G. R. Booth, 1898, 171 U. S. 450, 459 42
Grubbs v. *Atlantic C. L. R. Co.*, 1915, 101 S. C. 210 18

PAGE

Gulf C. & S. R. Co. v. *Texas Packing Co.*, 1917, 244 U. S. 31 ..... 10, 11, 12, 15, 26

Hadji, The, 1883, 18 Fed. 459 18
Hamilton v. *Pandorf*, 1857, L. R. 12 App. Case. 518 42
Hart v. *Pennsylvania R. Co.*, 1884, 112 U. S. 331 ..... 15, 26, 33
Harter Act, 46 U. S. C. sec. 190 5

Illinois R. Co. v. *Bogard*, 1900, 78 Miss. 11 21
Inman v. *Seaboard A. L. R. Co.*, 1908, 159 Fed. 960 16
International Navigation Company v. *Atlantic Mutual*, 1900, 100 Fed. 304 38

Judicial Code, Sec. 239 as amended by Act of 13th February, 1925, U. S. C. Title 28, Sec. 346 2

Kansas City &c. R. Co. v. *Carl*, 1913, 227 U. S. 639, 650 6

Lydian Monarch, The, 1885, 23 Fed. 298 18

Matter of Bills of Lading 1919, 52 I. C. C. 671, 710 ..... 16, 19
McConnell v. *Southern R. Co.*, 1907, 144 N. C. R. 87, 90 20
Merauke, The, 1929, 31 Fed. (2d) 974, 976 ..... 17, 25

Oneida, The, 1904, 128 Fed. 687 ..... 10, 15, 17, 26

Pearse v. *Quebec*, 1885, 24 Fed. 285 ..... 17, 18
Pennsylvania R. Co. v. *Olivit*, 1917, 243 U. S. 574 ..... 10, 15, 26
Phoenix Insurance Co. v. *Erie & Western T. Co.*, 1886, 117 U. S. 312 ..... 10, 11

PAGE

Rudolf on York Antwerp Rules, p. 102 35
Ruppel v. *Allegheny Valley R.*, 1895, 167 Pa. St. 166, 179 ..... 7, 20

St. Louis R. Co. v. *Coolidge*, 1904, 73 Ark. 112 21
Shaffer v. *Railroad Co.*, 1911, 21 I. C. C. 8 ..... 16, 19, 20, 23
Spada v. *Penn R. Co.*, 1914, 86 N. J. L. 187 19
Springfield Light, H. & P. Co. v. *Norfolk & W. R. Co.*, 1919, 260 Fed. 254 16
Straus v. *Canadian P. R. Co.*, 1930, 254 N. Y. 407 ..... 22, 23
Styria, The, 1900, 101 Fed. 728 ..... 17, 18

Union Pacific R. Co. v. *Burke*, 1921, 255 U. S. 317; 1917, 178 A. D. 783; 1919, 226 N. Y. 534 ..... 6, 7, 11, 13, 14, 20

Wallingford Bros. v. *Atchison*, 1917, 101 Kans. 544 ..... 18, 19
Western Transit v. *Leslie*, 1917, 242 U. S. 448 ..... 13, 29
Winter on Marine Insurance, p. 344 ..... 38, 39

Xantho, The, 1887, L. R. 12 App. Case. 504 41

York-Antwerp Rules, Rule 16 ..... 35, 37

Supreme Court of the United States

OCTOBER TERM, 1938.

H. V. B. SMITH, C. D. RAFFERTY and H. S. McCORMICK, co-partners trading as H. J. Baker & Bro.,
Appellants and Cross-Appellees,

against

Motorship *Ferncliff*, GLITTRA AKTIESELSKABET and FEARNLEY & EGER,
Appellees and Cross-Appellants.

No. 548.

BRIEF FOR APPELLANTS AND CROSS-APPELLEES.

OPINIONS BELOW.

The opinion and the supplemental opinion of the District Court of the United States for the District of Maryland are reported in 1938, 22 F. Supp. 728.

The Circuit Court of Appeals of the Fourth Circuit, after argument of the appeals certified to this court on 19th December, 1938, certain questions for decision. The case was docketed on the 28th December, 1938.

Jurisdiction.

The jurisdiction of this court is invoked under Section 239 of the Judicial Code as amended by Act of 13th February, 1925, U. S. Code, Title 28, sec. 346, which provides:

"In any case * * * in a Circuit Court of Appeals * * * the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause * * *".

The Case Presented.

The matter here involved arises out of a suit in admiralty to recover damages to shipments of fish meal on the Motorship *Ferncliff* in Japan and delivered to consignees in Norfolk, Va. and Baltimore, Md. in March, 1936. The damages were found to be negligently caused and the bills of lading to be subject to the Harber Act so that the carrier was not relieved from liability.

The certificate of the Court of Appeals states:

"Various questions have been raised by the appellants and cross-appellees in this case; but all but one of these have, in our opinion, been correctly decided by the court below for reasons adequately stated in the opinions of the District Judge. The remaining question, the extent of liability for cargo damage where the bill of lading contains a 'true valuation' clause based on invoice cost, is one of such importance that, in view of division of opinion with regard thereto in this Court, we feel that it should be certified to the Supreme Court for decision."

Statement of the Case.

The bills of lading for the cargo contain the following provision:

"All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him. No value was declared by the shipper.

The invoice value of the fish meal was $32.50 per ton. The value of the damaged portion of the fish meal at the time and place of delivery was $25.00 per ton and the market value of undamaged fish meal was $36.00 per ton.

The District Court held that the above quoted clause in the bill of lading was valid and computed the appellants' damages at the difference between the invoice value and the damaged value, or $7.50 per ton.

Appellants contended that the clause was invalid in principle, but that if valid, the computation of damages made by the District Judge was wrong under the principles announced by this court in *Ansaldo* v. *Rheinstrom,* 1935, 294 U. S. 494. It was urged that the invoice clause could be sustained only if the necessary computation of damages under it should be made by

ascertaining the percentage of damage to the goods and then applying that percentage to the invoice value. Such procedure was the only one that would never permit the carrier to escape altogether the consequences of its negligence. The percentage of loss should be found by taking the proportion which the actual loss of $11.00 per ton bore to the sound value of $36.00 per ton. This was 11/36 or 30.55%. By applying this percentage to the invoice cost of $32.50 per ton, the proper computation of damage was $9.92875 per ton instead of $7.50 as found by the District Judge.

The Court of Appeals said of this contention:

"It is pointed out that this is the method used in calculating the amount of loss under a valued marine insurance policy on cargo and also the method prescribed by Rule 16 of the York-Antwerp Rules for a general average adjustment. And it was stated at the bar of the court by counsel for appellant that the same method has been generally employed in estimating cargo damage since the decision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co. supra.*"

The amended certificate says that the statement of counsel was challenged by appellees' counsel.

The Court of Appeals further stated that in the absence of the decision in the *Ansaldo* case, they would affirm the decision below on the authority of certain cases that were cited, but they said:

"In view of that decision, however, we are divided and in doubt as to the validity of such a clause as is here involved and as to the method which should be employed in computing damages under it. * * * We, therefore, respectfully certify to the Supreme Court of

the United States the following questions of law as indispensable to a proper decision in this case:

1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?"

FIRST POINT.

THE INVOICE VALUE CLAUSE IS INVALID AS AN ATTEMPTED LIMITATION ON THE CARRIER'S LIABILITY FOR NEGLIGENCE. THE ANSWER TO THE FIRST QUESTION SHOULD BE, NO.

It is fundamental that one who is under the obligations of a common carrier may not contract for complete nor for partial exemption from liability for the consequences of his negligence. *The Ansaldo San Giorgio I.* v. *Rheinstrom,* 1935, 294 U. S. 494. The carrier here was in a similar position, for the Harter Act prevented him from contracting against liability for negligence. *The Erncliff,* 1938, 22 F. Supp. 728, 737. The Harter Act is 46 U. S. C., sec. 190.

This court said in *Kansas City &c. R. Co.* v. *Carl*, 1913, 227 U. S. 639, at 650:

"An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration."

There is one exception to this rule and the exception is based on estoppel. A carrier may limit his liability for negligence to an agreed valuation where the shipper

"receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. The agreement as to value, in consideration of carriage at the lower rate thus obtained is held to estop the shipper from demanding damages in excess of the agreed value."

Ansaldo v. *Rheinstrom, supra,* at p. 497.

As this court said in *Union Pacific R. Co.* v. *Burke*, 1921, 255 U. S. 317, 321, 322:

"As a matter of legal distinction, estoppel is made the basis of this ruling that, having accepted the benefit of the lower rate, in common honesty conditions on which it was obtained * * *.

"Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception."

the shipper may not repudiate the

The invoice value clause in the present case does not fall within the scope of the exception referred to in the *Burke* case, *supra*. The certificate of the Circuit Court of Appeals states:

"No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him."

Furthermore, the clause in this case did operate to limit the carrier's liability for negligence. The actual damage, or difference between damaged and market value, was $11.00 per ton. The allowance by the District Court of the difference between the damaged value and invoice value was $7.50 per ton.

The remaining portion of the clause giving the carrier option of replacing any lost or damaged goods will be considered a little later.

The result in this case, where the market value at destination exceeded the invoice value, would represent the ordinary situation for as the court said in *Ruppel* v. *Allegheny Valley R.*, 1895, 167 Pa. St. 166, 179:

"The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate and domestic trade."

On principle, therefore, the invoice value clause in this case should be held invalid as a violation of the rule of law announced by this court in *Ansaldo* v. *Rheinstrom*, *supra*, at page 496, that a carrier "cannot contract for relief from liability for his own negligence," and p. 499, "Such an agreement is against

public policy as its effect is to relieve the carrier from the consequences of its negligence."

In the *Ansaldo* case, *supra*, this court, at p. 497, 498, refers generally to the fact that this court, and other courts, have decided cases where a bill of lading embodied a stipulation similar to the invoice value clause here. That case involved consideration of a bill of lading which provided:

"In the event of claims * * * the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred."

Barrels of cherries in brine had arrived partially damaged from improper stowage. Owing to favorable market conditions at destination, the market value of the entire shipment, sound as well as damaged, exceeded the values stated in the invoices. The District Court held that the clause was reasonable and denied recovery. This finding was reversed by the Circuit Court of Appeals and the latter's decision was affirmed here.

This Court said, p. 496, that two valuation clauses were in frequent use. One is a true limitation agreement, under which damages are computed in the usual way, but, if when so computed they exceed the agreed limit of value, no recovery of the excess may be had. Such valuation agreements were said not to be enforceable unless the shipper receives consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation.

The other type of clause was stated to be, p. 497:

"A true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment."

This court then discussed various decisions dealing with invoice value clauses in the federal and state courts, some upholding and other denying validity of the clause. It was said finally, however, p. 498:

"We have no occasion to determine the requirements or the validity of such a contract."

This statement was made because, on the facts in the case, the clause required, p. 499:

"That if, after deduction of all losses and damage, the remaining cargo, in its then condition, is worth more at destination than the whole cargo at place and time of shipment, the carrier shall be wholly exonerated."

It was accordingly held that such a clause was invalid because, p. 499:

"Such an agreement is against public policy as its effect is to relieve the carrier from the consequence of his negligence."

The first question in the certificate from the Court of Appeals of the Fourth Circuit now asks this court to determine the validity of an invoice value clause.

We have already shown that, in principle, the clause should be held invalid as it relieves the carrier, to some extent, from the consequences of its negligence. Indeed, if the damaged goods should equal the invoice

value, as might easily be the case, the clause, as applied by the District Court, would relieve the carrier altogether from the consequences of its negligence. In this state of affairs, the situation would be exactly the same as that presented in the *Ansaldo* case, although the clause here does not contain the words that the damages should be computed on the basis of the invoice value "of the entire shipment."

Further, there is not, in this case, any element of estoppel. There was not any choice of rates and there was not any consideration for the limitation on the carrier's liability.

Some of the authorities dealing with an invoice value clause were collated in the *Ansaldo* case, p. 498. They do not constitute precedents binding on this court to establish the validity of the clause in question.

This court said of some of those decisions:

"In some, the parties treated the clause as binding and no decision was made on the point."

Those cases were *Phoenix Insurance Co.* v. *Erie & Western T. Co.*, 1886, 117 U. S. 312; *Pennsylvania R. Co.* v. *Olivit*, 1917, 243 U. S. 574; *Gulf C. & S. R. Co.* v. *Texas Packing Co.*, 1917, 244 U. S. 31; *The Oneida*, 1904, 128 Fed. 687.

This court said of *Chicago M. & S. Co.* v. *McCaull-Dinsmore*, 1920, 253 U. S. 97, that the clause was held prohibited by the Cummins Amendment, 1915,* but the validity in cases not controlled by that enactment was not decided. The Cummins Amendment, 1915, provided in substance that the carrier "shall be liable * * *

* See Appendix.

for the full actual loss, damage or injury * * * notwithstanding any limitation of liability or limitation of the amount of recovery * * * in any such receipt or bill of lading." That amendment merely expressed the general rule of law that has frequently been announced by this court. See the *Burke* case, *supra*, p. 323, and the *Ansaldo* case, *supra*, p. 496.

This court said of the clause in the *McCaull* case, *supra*, p. 100:

"In this case it does prevent a recovery of the full actual loss, if it is enforced. The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions * * *".

This court further said in the *Ansaldo* case, p. 498:

"In several cases there are expressions, not necessary to the decisions, to the effect that it is a reasonable and lawful provision for measuring damages."

The *Phoenix* case, the *Gulf* case and the *McCaull-Dinsmore* case were cited in support of that statement.

In the *McCaull-Dinsmore* case, however, the court while stating its understanding of the reasons in support of the clause, declared the clause was invalid as contrary to the plain language of the Cummins Amendment.

In *Phoenix* v. *Erie & Western*, *supra*, the point of the case concerned a clause in a bill of lading under which the carrier, when liable for a loss, should have the full benefit of any insurance on the goods. That

clause was held valid as between carrier and shipper. In a dictum, the court said, p. 322:

"So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination * * *".

This is not a holding that the stipulation in the bill of lading was lawful. The stipulation was not controverted and did not enter into the decision, as this court said in the *Ansaldo,* p. 498.

Nor can we find any suggestion in *Gulf* v. *Texas, supra,* that such a provision as is under discussion is a reasonable and lawful provision for measuring damages. The court said, p. 37, referring to the ordinary measure of damages:

"The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

It seems to have been assumed that this stipulation was valid. There is not anything to indicate that there was any discussion on the subject.

The next comment by this court in the *Ansaldo* case on the decisions dealing with invoice value clause was, p. 498:

"In none was there a decision that a choice of rates was essential to its validity, although there are indications of that view."

The cases cited are *Western Transit* v. *Leslie*, 1917, 242 U. S. 448, and the *Burke* case, *supra*.

The case of *Western* v. *Leslie* apparently did not involve an invoice value clause, but a provision in the railway's tariff and bill of lading was "Value not to exceed $100 per net ton." The bill of lading gave the consignor the option of shipping goods at a higher rate without limitation as to value in case of loss or damage. Twenty-five tons of copper ingots were shipped and about one ton was lost, the actual value greatly exceeding $100 per ton. The court said the clause fixed a ratio and not an arbitrary limit of recovery. The shipper was held entitled to recover not more than $100 a ton for each or any ton damaged or lost. The court said, p. 453:

"The release valuation clause in an interstate bill of lading when based upon a difference in freight rates is valid."

The validity of the clause, therefore, was supported by the choice of rates given in the bill of lading.

In the *Burke* case, *supra*, goods were shipped from Yokohama to New York. The bill of lading for ocean transportation to San Francisco and thence by railroad to New York, contained a provision that the liability of the carrier for loss of any of the goods should not exceed $100 per package. The uniform railroad bill of lading contained a provision:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight

charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occcurs from negligence."

It appears from the opinion in the Appellate Division, 1917, 178 A. D. 783, 784, that "the fair, reasonable and market value of the goods was $17,549.01, for which * * * the plaintiff demands judgment."

The invoice value apparently was the same amount. See *Burke* case, *supra*, p. 318. The goods were damaged in the hands of the railway carrier which sought to limit its liability to the sum of $100 per package as mentioned in the ocean bill of lading, claiming that that represented the agreed value mentioned in the clause above quoted from the railroad uniform bill of lading. The New York Court of Appeals declined to give effect to the limitation of $100 a package, saying, p. 542:

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation limitation and relief from full liability. (Cincinnati, New Orleans & Texas Pac. Ry. *v.* Rankin, 249 U. S. 319, 327.)"

In the result the court gave judgment for the invoice value which was the full market value.

The judgment of the Court of Appeals was affirmed by this court, which said, p. 323:

"Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the Uniform Bill of Lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner, would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made, only with the ignorant, the unwary or with persons deliberately deceived."

The certificate of the Court of Appeals in the case at bar cites *Gulf* v. *Texas, supra, Penn. R. Co.* v. *Olivit, supra, Hart* v. *Pennsylvania R. Co.*, 1884, 112 U. S. 331, *The Californian*, 1936, 82 F. (2d) 283, *Duplan Silk Co.* v. *Lehigh Valley R. Co.*, 1915, 223 Fed. 600 and *The Oneida, supra.* All these cases, except the *Hart* case, *The Californian* and the *Duplan Silk* case have already been considered.

Hart v. *Pennsylvania R. Co.* is not an invoice value case, but one where there was a limitation agreement supported by a choice of rates. See *The Ansaldo, supra*, p. 497.

In *The Californian, supra*, there was a form of invoice value clause and there was also a choice of rates.

In the *Duplan Silk* case, there was a limitation of liability to $1.00 a pound and also a choice of rates.

A few additional cases in the federal court were cited in the District Court's decision in the *Ansaldo* case, 1933, 3 F. Supp. 579, 581.

In *Inman* v. *Seaboard A. L. R. Co.*, 1908, 159 Fed. 960, there was a bill of lading clause that the value of goods lost or injured should be "computed on the value of the property at the place and time of shipment." It was held that such a clause was reasonable and had been sustained in other cases, but there was not any discussion on the subject. The court treated the case, pp. 968, 969, as one giving the shipper a choice of rates.

Springfield Light, H. & P. Co. v. *Norfolk & W. R. Co.*, 1919, 260 Fed. 254, came up on demurrer to a defense. The suit was against a common carrier for coal converted by the carrier. The railroad's coal tariff, filed with the Interstate Commerce Commission fixed the measure of damage "on the basis of the value of the property at the time and place of shipment". It was said that to permit the plaintiff to recover for a greater value than it should recover while paying the same rate as other shippers would be a discrimination and the demurrer was overruled. The case apparently was decided on the strength of the decision of the Interstate Commerce Commission in *Shaffer* v. *Railroad Co.*, 1911, 21 I. C. C. 8. That case supported the invoice value clause in the uniform railroad bill of lading as a convenience in settlement of claims. The Commission arrived at a different conclusion after the Cummins Amendments of 1915 and 1916,* and held that the clause was unlawful and void. *Matter of Bills of Lading*, 1919, 52 I. C. C. 671, 710. These amendments made the carrier liable for the full actual loss, notwithstanding any limitation of liability or the amount of recovery, except in the case of property concerning

* See Appendix.

which the carrier is authorized by law to establish and maintain rates dependent on the value of the property.

The Asuarca, 1924, 13 F. (2d) 222, was a decision in the Southern District of New York where a bill of lading clause provided that the carrier should indemnify for the actual intrinsic value of the goods loaded "ascertained from the invoices of origin or from valuation given by competent persons without being obliged to pay any indemnification for profits not made nor for increased valuation." The clause was upheld as a conventional valuation of the goods on the authority of the *Duplan Silk* case, *The Oneida* and *Pearse* v. *Quebec*, 1885, 24 Fed. 285.

The *Duplan Silk* case has already been distinguished. *The Oneida* is one of the cases where this court stated in the *Ansaldo* case, *supra*, that the parties treated the clause as binding and no decision was made on the point. The decision does not give any independent discussion on the validity of the clause.

In *Pearse* v. *Quebec*, the bill of lading provided

"In case of damage, loss or non-delivery, the shipowner will not be liable for more than the invoice value of the goods."

This is really a limitation clause and not a clause under which the damages are to be adjusted on the basis of the invoice value. The clause itself would be void under the decision of this court in the *Ansaldo* as there was not any choice of rates The construction of the clause and the computation of damages was overruled in the *Styria*, 1900, 101 Fed. 728, 735. See *The Merauke*, 1929, 31 F. (2d) 974, 976, which stated that such a clause was void without a choice of rates.

Two other federal cases are sometimes mentioned on this subject.

The Hadji, 1883, 18 Fed. 459, had a similar clause to that in *Pearse* v. *Quebec, supra*, and was also overruled in *The Styria, supra.*

The Lydian Monarch, 1885, 23 Fed. 298, in the District Court of New Jersey contained a clause similar to that in the *Pearse* case. The court said, p. 300:

"If it should turn out that the libelant has received from the sale of the damaged goods, the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed."

This decision is clearly contrary to the principles of the *Ansaldo*, for in the contemplated circumstances the carrier would escape all liability for the consequences of his negligence, although the invoice value clause did not contain the words "of the entire shipment."

The foregoing are substantially all the federal cases, so far as we can find, that are cited as supporting the principle of the invoice value clause here.

Nine cases in state courts were cited by the District Court in the *Ansaldo*, 1933, 3 F. Supp. 579, 581, as authority that the invoice clause, as it stood in that case, was valid. Those cases were: *Bowman-Kranz Co.* v. *Bush, Receiver*, 1920, 104 Neb. 165; *Davis, Director-General* v. *Zimmern*, 1924, 211 Ala. 63; *Wallingford Bros.* v. *Atchison*, 1917, 101 Kans. 544; *Grubbs* v. *Atlantic C. L. R. Co.*, 1915, 101 S. C. 210; *Brockman Co.* v. *Mo. Pac. R. Co.*, 1916, 195 Mo. App. 607; *Denver etc. R. Co.* v. *Peterson Grocery*, 1915, 59 Colo. 125;

Coleman v. *N. Y., N. H. & H.*, 1913, 215 Mass. 45; *Fahey* v. *Baltimore & O. R. Co.*, 1921, 139 Md. 161; *Spada* v. *Penn. R. Co.*, 1914, 86 N. J. L. 187. All these cases dealt with the clause in the railroad uniform bill of lading in use at that time and supported at that time by the decision of the Interstate Commerce Commission in *Shaffer* v. *Chicago, supra.*

In six of the cases there was not any discussion of the question whether the clause assumed to relieve the carrier from the consequences of his negligence.

In the *Bowman* case, the court merely said that "recent decisions seemed to hold" that the clause was not an attempt to limit the liability of the carrier for negligence and it was not void under the Cummins Amendment 1916. Reliance was placed on the *Shaffer* case although that was overruled in *Matter of Bills of Lading, 1919, supra,* and seems contrary to the clear language of the amendment.

In the *Wallingford* case, it was merely said "the provision is intended to establish a rule in determining the value of the property in the event of loss and not, as plaintiffs contend, to limit or diminish the carrier's liability." Reliance was placed on the *Shaffer* case, *supra.* In fact the effect of the provision was to limit or diminish the carrier's liability. The invoice price was less than the market price at destination.

In *Davis* v. *Zimmern, supra,* the court, referring to an earlier case in Alabama, merely stated that the clause "does not involve an exemption from liability on account of negligence." Reference was made to the *Shaffer* case.

If the foundation of the *Shaffer* decision is taken away from all these cases, it may well be doubted whether the clause would have been upheld. Certainly there is not anything in the cases which gives any reason that should weigh against the conclusions announced by this court in the *Burke* case, in the *Ansaldo* case and in the earlier decisions mentioned therein.

Cases in the state courts holding that such a clause is invalid where loss is occasioned by negligence of a carrier, include *Ruppel* v. *Allegheny, supra,* where a stipulation in a bill of lading that "the amount of any loss or damage shall be computed at the value of the property, at the place and time of shipment" was held invalid. The court said of the stipulation, p. 180:

"The condition is palpably a limitation of or reduction on the loss of the shipper. * * * The plain effect of it is, not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it, a reduction in the real loss. It is therefore void."

McConnell v. *Southern R. Co.,* 1907, 144 N. C. R. 87, 90, involved negligent damage to a carload of melons shipped from Bamberg, S. C. to Philadelphia. The court declined to uphold a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment. It was said, p. 90:

"The consignor ships to get the benefit of the market price at the place of destination, and a contract in cases of negligence that the damages shall be measured by the price at the place of shipment is *pro tanto* an agreement for partial exemption for the carrier's negligence, and is void."

Illinois R. Co. v. *Bogard,* 1900, 78 Miss. 11, was a suit for damages to livestock. The court said, p. 15:

"We now reannounce the true rule to be that a common carrier cannot validly contract for exemption from damages arising out of his own negligence, even to the extent of limiting his liability to account for values at the place of shipment."

St. Louis R. Co. v. *Coolidge,* 1904, 73 Ark. 112, was a suit for damages to a car of potatoes shipped on appellant's railroad and negligently damaged. The court declined to apply, p. 116, a clause in the bill of lading "that the value of the same at a point of shipment shall determine the measure in the event of loss of the goods." It was said, p. 117:

"Contracts restricting the liabilities imposed on carriers by law are only valid when fair and reasonable and upon a consideration, usually a reduced rate of freight, in consideration of the release from given legal liabilities."

Numerous decisions in Arkansas were cited and the court said, p. 117:

"These principles and authorities control, and without a consideration this clause of the contract is void."

Baltimore R. Co. v. *Oriental Oil,* 1908, 51 Texas, C. A. R. 336, was a suit for negligent loss of oil during transit on the railroad. The bill of lading provided "The amount of any loss or damage for which any carrier becomes liable shall be computed on the value of the property at the place and at the time of shipment under the bill of lading unless a lower value has been

agreed upon or is determined by the classification upon which the rate is based." The court said, p. 340:

"Under the law of this State, it seems clear that the stipulation in the bill of lading limiting appellant's liability to the value of the oil at the point of shipment is contrary to public policy and void."

Finally, in *Straus* v. *Canadian P. R. Co.*, 1930, 254 N. Y. 407, the New York Court of Appeals dealt with a case of theft of silk through negligence of the carrier where the bill of lading contained a provision "All claims * * * shall be adjusted upon the basis of the market value * * * at the place and time of original shipment unless the invoice or declared value of the said goods or property shall be less than such market value, in which case such invoice or declared value (whichever shall be the less) shall be the maximum, provided, however, that in no case shall the carriers be liable * * * beyond the sum of $10.00 per cubic foot nor in any case exceeding $100.00 for any one package, or any article not enclosed in a package unless a higher value shall have been declared in writing at the time of shipment and *ad valorem* freight paid thereon." The court said, p. 416, of this clause:

"The attempt to arbitrarily limit liability—to the value of the silk at the time and place of shipment in the event that the value was declared and an *ad valorem* rate paid, and otherwise to $100 per package—was without consideration. Under the wording of the bill of lading, the shipper could not, in any event, recover more than the value of the goods at the time and place of shipment, even though it placed a higher valuation thereon and paid an *ad valorem* rate. Such attempted

absolute limitation, of liability, regardless of the rate paid, makes the clause void."

The *Straus* case is said by the District Judge in the *Ansaldo* case to be "opposed to the great weight of authority". What the District Judge mentions as the great weight of authority consists of the decisions previously mentioned on the clause in the uniform railroad bill of lading which once was supported, but now is without support since the *Shaffer* case has been overruled.

It is fair to say, therefore, that the decisions in the state courts mentioned by the District Judge in the *Ansaldo* no longer constitute authority in support of the clause and that the remaining decisions in state courts, as mentioned above, are wholly in line with the decisions of this court which indicate that, under the circumstances of this case, such a clause is invalid.

The argument to support an invoice value clause is commonly put on three grounds:

1. As suggested by the court in *The Ansaldo,* p. 497, that the provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier and may lessen the carrier's normal liability if they should appreciate prior to that time.

2. The clause eliminates speculative elements in computing damages which might result from rise or fall in the value of the goods.

3. It is more convenient to use the invoice value than to ascertain the market for sound goods at destination.

None of these grounds seems sufficient to support the clause.

1. The depreciation would have to be so great as to reduce sound market value below invoice value to give the shipper any benefit. Perhaps such depreciation would be unlikely. In any event, the shipper would not have the opportunity which has been held essential in upholding a limitation agreement, of making a choice between having his goods carried at one rate with common law liability by the carrier or, at a lower rate, with restricted liability of the carrier. There would not be any basis for estoppel. Furthermore, in the particular clause in question, which gives the carrier the option of replacing any lost or damaged goods, the shipper would not benefit by the depreciation for the carrier could discharge his liability by buying similar goods at the depreciated market price.

2. Speculative elements of damages because of rise and fall in markets certainly were not eliminated by the way in which the clause was applied by the District Judge in this case and as it has commonly been applied. A fluctuation in the market with respect to sound goods also affects damaged goods and the deduction of damaged value from invoice value would give a result that varied with the fluctuation.

3. The argument of convenience rests on an assumption of difficulty in ascertaining market value at destination. No such difficulty normally exists. Certainly an argument of assumed, but doubtful convenience should not be permitted to override plain dictates of public policy which forbid a carrier to contract against liability for his negligence.

SECOND POINT.

THE ANSWER TO THE SECOND QUESTION SHOULD BE, NO.

The second question certified to this court asks whether, if the invoice clause is valid, the damages to a shipment should be ascertained by deducting the value of the damaged goods in their damaged condition at time and place of delivery, from invoice cost valuation as fixed by such a clause.

The District Judge assumed to differentiate the invoice value clause in the present case from that in the *Ansaldo* case, because the words "of the entire shipment" that occur there were omitted here. 1938, 22 F. Supp. 728, 742. The omission of those words might make a difference in some cases, but would not make any difference whatever where the value of the damaged goods should be equal to the invoice value. That situation might easily exist as a result of appreciation of the value of goods between the purchase of the goods and the arrival of the vessel at destination. Indeed, in *The Merauke,* 1929, 31 F. (2d) 974, the invoice cost of the lost cargo was $10,000, while its sound market value at destination when the ship arrived would have been over $33,000. Thus, if the situation in *The Merauke* case had existed in this case, the consignees would not have made any recovery at all on the computation outlined in the second question; for the actual extent of damage here was 30.55%.

Therefore, the construction outlined in the second question clearly violates the rule of the *Ansaldo* case that a carrier, p. 496, "cannot contract for relief from

liability for his own negligence" and p. 499 "such an agreement is against public policy as its effect is to relieve the carrier from the consequences of its negligence."

A construction cannot be permitted which would preclude recovery, if the damaged value should equal the invoice value of any unit, whether package, ton, or entire shipment.

It is immaterial that in this particular instance the damaged value of the goods was less than the invoice value. The construction given to the clause must be susceptible of uniform application. It is not permissible to compute damages under the clause in one way in a given situation and by a different method in a different situation.

The Court of Appeals in its certificate, says that in the absence of the decision in the *Ansaldo,* they would affirm the decision below on the authority of six cases cited in the certificate and already dealt with in this brief.

Of those cases, *Hart* v. *Pennsylvania R. Co.,* as stated by this court in the *Ansaldo,* was a limitation case and not an invoice value case. This decision is frequently referred to in other cases in connection with the computation of damages as if it were an invoice value case or what is called in the *Ansaldo,* a true valuation clause.

Of the other cases, this court in the *Ansaldo,* p. 498, said that *Gulf* v. *Texas, Pennsylvania* v. *Olivit* and *The Oneida* were instances where "the parties treated the clause as binding and no decision was made on the point." The same statement is true of *The Californian.*

The only remaining case cited is *Duplan Silk Company.* That case perhaps is better discussed in the next point.

In none of the foregoing cases, nor indeed in any of the other cases dealing with invoice value, and computation of damages thereunder, is there any discussion or apparent consideration of the point that where the damaged value equals or exceeds the invoice value, the carrier would be completely exonerated from the consequences of his negligence. Under the principle of the *Ansaldo* and other cases, that point should be fatal to the computation of the damages in the manner indicated in the second question.

Furthermore, the computation of damages outlined in the second question certainly does not eliminate the "variable factor of the market value" as suggested by the District Judge in this case, 1938, 22 F. Supp. 728, 744, nor can it be said that "it guards the parties against fluctuations in the market while the goods are in transit" as suggested by the District Judge in *The Ansaldo,* 1933, 3 F. Supp. 579, 581. Fluctuations of the market are not eliminated by substituting the invoice value for the market value of sound goods at destination in computing damages in any case of partial loss.

If the market rises after the date of sailing, the value of the damaged goods may equal the invoice value and, therefore, preclude recovery. If the market value of sound goods falls below the invoice value after the date of sailing, the depreciation will be reflected in the value of the damaged goods and the carrier will then have to pay much more than he should pay. Thus,

although the extent of physical damage to the goods might be exactly the same in the two instances, the amount payable by the carrier would vary according to the fluctuations in the market. Such a result would defeat what is said to be the purpose behind the clause.

THIRD POINT.

THE ANSWER TO THE THIRD QUESTION SHOULD BE, YES.

The third question certified to this court asks, on the assumption that the invoice valuation clause is valid, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

It is submitted that the procedure outlined in this question, which may be described as the percentage method, is correct in principle and the only method that in all situations will give the consignee a recovery proportionate to the loss he sustains and will never permit the carrier to be relieved from the consequences of his negligence.

The percentage of actual damage is easily ascertained and it is by no means necessary, as the District Judge suggested, 1938, 22 F. Supp. 728, 744, to resort in all cases to the factor of market value.

In numerous cases it is possible for experts to decide by inspection of damaged cargo that the depreciation amounts to 50% or some other stated proportion.

In such cases the ascertainment of market value is quite unnecessary.

Similarly, if the invoice value of a package containing a dozen identical pieces should be $120 and one piece should be destroyed, the cargo owner would be entitled to recover 1/12th or 8⅓% of the invoice value without regard to the market value.

So, also, there may be instances where a number of bags or packages are damaged. If the invoice value is in a lump sum and some of the packages are worthless, the percentage represented by those packages is taken of the invoice value and there need never be any reference to the market value.

Thus, in *Western Transit Co.* v. *Leslie,* 1916, 242 U. S. 448, where the value of copper ingots was stated in the bill of lading not to exceed $100 a ton, the court said, p. 454, "The valuation clause fixes not an arbitrary limit of recovery but a ratio." The case was sent back for the computation of damages accordingly.

In many instances, however, as in the present case, the ascertainment of the extent of damage must be the result of comparing the price the damaged goods will bring with the price they would have brought, if sound.

By whatever means the percentage of damage is obtained, the shipowner's liability is adjusted by applying the percentage of loss to the invoice cost. The cargo owner will be entitled to recover and the shipowner will be required to pay only a given amount for the same percentage of loss, whether the market value for sound goods has risen or fallen and whether the value of the damaged goods is less or more than their invoice value.

Commonly shipments of cargo are made a considerable period of time after the contracts have been made for the purchase of the goods and the invoice price has been fixed. Thus there is usually a very substantial spread of time before the arrival at port of destination and there is opportunity for considerable fluctuation in value.

The operation of the percentage, or true rule as compared with the ordinary measure of damages or the method of computation in the court's second question, may be seen from the following examples where there has been respectively a fall in market and a rise in market after the purchase of the goods which determines the invoice valuation.

1. The case of a fall in market value.

Assumed values per ton: invoice $32.50; market for sound goods on arrival $25.00; damaged value $22.00.

a. Normal measure of damages.

Sound value	$25.00	per ton
Damaged "	22.00	" "
Actual loss	$ 3.00	" "

b. Computation of damages under Question 2.

Invoice value	$32.50	per ton
Damaged "	22.00	" "
Recovery	$10.50	" "

c. Percentage or true rule of computation under Question 3.

Sound value	$25.00	per ton
Damaged "	22.00	" "
Actual loss	$ 3.00	" " or 12%

Recovery: 12% of invoice, $32.50, or $3.90 per ton.

2. The case of a rise in market value.

Assumed values per ton: invoice, $32.50; market for sound goods on arrival, $40.00; damaged value $35.20.

a. Normal measure of damages:

Sound value	$40.00	per ton
Damaged "	35.20	" "
Actual loss	$ 4.80	" "

b. Computation of damages under Question 2.

Invoice value	$32.50	per ton
Damaged "	35.20	" "
Recovery	None	

c. Percentage or true rule of computation under Question 3.

Sound value	$40.00	per ton
Damaged "	35.20	" "
Actual loss	$ 4.80	" " or 12%.

Recovery: 12% of invoice, $32.50 or $3.90 per ton.

Thus it will be seen that on the computation under Question 2 the consignee would receive $10.50 per ton when the market for sound goods fell, although the consignee's actual loss was $3.00 per ton, and would receive nothing at all when the market rose, although the actual loss was $4.80 per ton.

Under the percentage or true rule, however, as the percentage of loss was the same in both cases, the consignee would recover $3.90 per ton in each case. This would be somewhat more than actual loss when the market fell and somewhat less than actual loss when the market rose. The effect of market fluctuations would be entirely eliminated.

This rule also meets the suggestion in the *Ansaldo,* p. 497. that

"Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time."

Duplan Silk v. *Lehigh Valley R. Co.,* 1915, C. C. A. 2d, 223 Fed. 600, mentioned in the certificate in this case, is referred to as an authority against the application of the percentage method of determining damages under an invoice value clause.

One clause in the bill of lading was printed, and it was the clause of the uniform railroad bill of lading, *supra,* p. 13. Another clause was stamped on the bill of lading as follows:

"Liability limited to $1.00 per pound. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case

of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable because of the lower rate thereby accorded for transportation."

The "specified value" or the "value represented in writing by the shipper" in this case was $1.00 per pound. The Court of Appeals considered that there was no substantial difference between the ideas expressed in the two clauses and said, p. 604:

"When, however, the valuation fixed is intended to express the agreed value of the goods, the carrier will be liable for the difference only between the damaged value and the agreed value. *Hart* v. *Penn. R. R.*, 112 U. S. 331; *Bachman* v. *Clyde S. S. Co.*, 153 Fed. 403; *Hohl* v. *Norddeutscher Lloyd*, 175 Fed. 544; *Pierce* v. *Wells Fargo Co.*, 189 Fed. 561. As in all other controversies arising upon written contracts, the fundamental question is what does the contract provide? That the method of calculation provided may not be as equitable as the method of calculation provided under some other contracts—*e. g.*, under policies of marine insurance—is not important. The question is whether the parties have agreed on that method."

The court then assumed that the parties had agreed on a method of calculation consisting only of the difference between the damaged value and the agreed value, but nothing is indicated in the facts to show that the parties did agree to any such method.

The *Hart* case and the other cases cited by the court were all cases of limitation and not of valuation and they do not furnish any authority for the method of

determining damages in a valuation case followed by the Court of Appeals. It will be observed that the court apparently conceded that the percentage method, which is the one followed under policies of marine insurance, was a more equitable method of calculation of damages.

The court does not seem to have considered, and certainly does not mention, the circumstance that the method actually followed would, whenever the damaged value equalled the agreed value, relieve the carrier altogether from the consequences of his negligence.

There seems no more reason why a valuation clause in a bill of lading should operate as an estoppel or preclude proof of actual value than is the case with a valuation clause in a policy of marine insurance. This court said in *Aetna Insurance Co.* v. *United Fruit Co.*, 1938, 304 U. S. 430, 434, when speaking of a marine insurance policy:

"We think that the valuation clause in its usual form does not operate as an estoppel or by agreement to foreclose proof that actual value exceeds agreed value when the question is of the insurer's right to subrogation. The application of the agreed value to the insurance adjustment does not depend upon estoppel. * * *"

P. 435, "In the case of partial insurance of cargo under a valued policy the insured is treated as a co-insurer and is allowed to recover on the policy only such proportion of the loss as the insured value bears to the actual value, a computation which necessarily requires proof of the actual value in order to establish the co-insurance relationship."

The true rule above mentioned is the principle that is stated in Rule 16 of the York Antwerp Rules 1924 dealing with General Average. That rule states:

"Amount to be made good for cargo lost or damaged by sacrifice.—The amount to be made good as General Average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

"Where goods so damaged are sold after arrival, the loss to be made good in General Average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on the date of sale."

This rule was adopted at Stockholm at the meeting of the International Law Association on 8th September, 1924.

Rudolf in his book on the York Antwerp Rules, p. 102, says:

"It is claimed by the advocates of this method that it provides a perfect solution of the difficulties inherent in the other methods. In the first place, any variation in the amount of loss caused by the sacrifice owing to the rise or fall of the market before date of sale, is excluded by a comparision of the proceeds with the sound value on the date of sale. The percentage of loss so arrived at is then applied to the sound value which the owner of the goods would have realised had he not been deprived of them by reason of the sacrifice, and the result thus more nearly approximates to the true meaning of the rule where it provides that the

amount to be made good 'shall be the loss which the owner of the goods has sustained thereby, *based on the market values at the date of the arrival of the vessel.*' It is a method, moreover, very familiar to anyone conversant with the calculation of claims under a contract of marine insurance, where the percentage of loss arrived at by a comparison of the proceeds with the sound value on date of sale is first ascertained and then applied to the insured value. Instead of the insured value, which is only relevant of course where a claim under a policy is concerned, the value which the owner of the goods would have realised had they arrived sound is adopted as the basis for calculating the loss to be made good in General Average. The method has the advantage that however long the delay may be in arranging the sale, and whatever the fluctuations in market may be after arrival, the actual loss in value 'which the owner of the goods has sustained' through the sacrifice is correctly ascertained, and the amount of compensation is then 'based on the market values at the date of the arrival of the vessel.' "

The same rule is followed in computing loss under a valued policy in marine insurance.

The *British Marine Insurance Act 1906,* Sec. 71 (3) provides:

"Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value."

The reference to market value in the York Antwerp Rules and sum fixed by the policy in the British Marine Insurance Act would mean the invoice value in the present case.

See also *Arnould on Marine Insurance,* p. 1314, where, speaking of particular average where an owner's property has been deteriorated by damage, it is said:

"and such owner, if insured, has a claim against his underwriter in proportion, 1st, to the degree by which the damage sustained may have diminished the value to him of the property insured; 2nd, to the sum which the underwriter by the policy has agreed to insure on such property.

"Whatever percentage this deterioration may amount to on the value which the property would otherwise have sold for, that same percentage the underwriter is bound to pay to the assured, upon the sum for which, by the policy, he has agreed to stand insurer.

"For instance, if goods which have been insured for 500L., would have realized in the market to which they were being sent 1,500L., but for the occurrence of a particular average loss, which prevents them from selling there for more than 1,200L., it is plain that these goods have been deteriorated to the extent of 300L., or one-fifth of the value they would otherwise have realized: the underwriter, in such case, is not bound to repay the assured 300L., or the whole amount of the actual loss sustained, but only 100L., or a fifth part of the sum for which the goods were insured * * *."

The percentage rule in this country with respect to insurance on goods is similar to the statement in the British Marine Insurance Act and to the provision of

Rule 16 of the York Antwerp Rules 1924. The subject was discussed by Judge Brown in *International Navigation Company* v. *Atlantic Mutual,* 1900, 100 Fed. 304. The case is frequently referred to as the *St. Paul.* The court first discussed the rule with respect to insurance on hull where in case of partial damage recovery was allowed of the damage up to the insured amount. At p. 324 Judge Brown said: "With goods or freight the case is different." The court then considers certain examples covering both rise and loss in market and says:

"Neither the insurer nor the assured should gain or lose from such accidental circumstances. These elements should, therefore, be eliminated; and this may be done by taking the proportion of loss to the sound value as ascertained by a sale at the place of discharge, and then taking that same proportion of the policy value, which will give the amount to be paid by the insurers pro rata, reckoning the owner as constructive insurer for any uninsured part of the policy value."

The policy value in a valued policy takes the place of the invoice value.

The difference between hull policies and cargo policies is explained by this court in *Aetna Insurance Co.* v. *United Fruit Co.,* 1938, 304 U. S. 430, 435.

The rule is stated also in Winter on Marine Insurance at p. 341, where it is said:

"The adjustment of a particular average caused by damage, however, is more difficult, and is determined by ascertaining the percentage of depreciation on the goods. This is done by comparing their gross sound value with their gross damaged value as fixed

in the open market. When this percentage is found, it is applied to the insured amount under the policy and settlement of loss is made accordingly. There is added to this sum whatever expenses may have been incurred in connection with the settlement of the loss. It will be pertinent at this point to direct attention again to the fact that, in marine insurance, unlike ordinary fire insurance, the underwriter is merely a coinsurer of the property with the assured if the latter has not insured his property in full, and a particular average, no matter how small, will be adjusted by applying the percentage of depreciation to the amount insured on the damaged property."

The analogy between the policy value in marine insurance and the invoice value as a basis of computing damages in a bill of lading seems to be very close. The valuation is inserted in the valued policy and in the bill of lading for the same purpose. The insurer and the carrier are alike indemnitors with respect to loss computed on the valuation. In each instance an endeavor is made to avoid the uncertainty of fluctuations in market value and to stabilize the basis of recovery. In both instances the first inquiry is the percentage of damage. In determining such percentage reference is sometimes made to the sound market value as compared with the damaged value. Sometimes the market value is not actually considered, but a percentage of damage is ascertained perhaps by reference to the quantity damaged as compared with the quantity that is sound. That procedure is commonly followed where it is feasible to determine a physical percentage of the damage. Sometimes the percentage of loss is determined by agreement. *Winter*

on Marine Insurance, 344. When the percentage is ascertained, then that percentage is taken of the insured value under the policy or the invoice value under the bill of lading clause.

Reference to market value, which is occasionally made to ascertain the percentage of loss in order to determine the damages payable under a valued policy or under a valid invoice value clause, does not disregard the finality of the value in the policy or the invoice value clause in adjusting damages. Some extrinsic means must always be employed to determine, in the first instance, the actual loss as distinct from the damages which may have to be paid. Reference to market value may be merely the most convenient extrinsic means.

Arnould says of a valued policy, Sec. 340, p. 478:

"Of course, in the case of the goods being partially damaged, the policy alone can never show what the underwriter ought to pay; for the amount due from him is the same percentage on the sum he has agreed to insure, as the damage which the goods have suffered is upon their value; in other words, the proportion of the whole sum insured which the underwriter has to pay in case of loss, must depend upon the proportion in which the goods are damaged: as the one sum cannot be ascertained without fixing the other, and as the damage the goods have sustained can never be made out except by calculations wholly extrinsic to the policy, every policy, whether open or valued, must in this sense be opened in every case of average loss.

"Opening the policy, then, in this sense, means nothing more than resorting to extrinsic evidence, in order to ascertain the amount of damage sustained by the subject insured, so as to fix one element in calculat-

ing the amount of indemnification to which the assured is entitled; it is, in fact, merely ascertaining the percentage of damage sustained by the thing insured."

We submit indeed that there is not any distinction in principle between the ascertainment of loss under a valued policy and computation of damages under a bill of lading containing an invoice value clause such as is found here.

It might well be that of two shipments of the same commodity one would be insured at its invoice value and the other would not be insured. In case of damage, the receiver of the goods would compute his loss and claim against the underwriter on the well-recognized percentage basis. It seems altogether proper that the receiver in proceeding against the shipowner on the uninsured parcel should compute the damages with respect to the invoice value in exactly the same way that the loss would be computed against the underwriters. Both the policy and the invoice value clause in the bill of lading merely specify a value on the basis of which settlement is to be made. It has long been decided that a similar construction should be given to similar language in a policy of insurance and in a bill of lading.

Thus in the *Xantho*, 1887, L. R. 12 App. Case, 503, Lord Herschell in considering whether there was any difference between the words "perils of the sea" in a bill of lading and in a policy of insurance, said, p. 510:

"It would in my opinion be very objectionable, unless well settled authority compelled it, to give a different meaning to the same words in two maritime instruments."

Lord Macnaghten said, p. 517:

"Whatever the expression 'perils of the sea' means in a policy of insurance, it means neither more nor less in a bill of lading."

See also *Hamilton* v. *Pandorf*, 1857, L. R. 12 App. Case, 518, where Lord Watson said, p. 526:

"The expression has precisely the same significance in both cases."

And Lord Bramwell said, p. 527:

"I am of opinion that 'perils of the seas' is a phrase having the same meaning in bills of lading and charter parties as in policies of insurance."

See also the *G. R. Booth*, 1898, 171 U. S. 450, 459.

We submit that it has been shown that any construction other than the true rule above mentioned may result in relieving the carrier wholly from the consequences of its own negligence in causing damage and that is something which this court said in the *Ansaldo* case cannot be permitted.

Respectfully submitted,

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January, 1939.

APPENDIX.

Cummins Amendments 1915 and 1916 of Interstate Commerce Act. Act of Mar. 4, 1915, 38 Stat. 1196; Act of Aug. 9, 1916, 39 Stat. 441; 49 U. S. C. §20(11).

1915. "Any common carrier, railroad or transportation company subject to the provisions of this chapter receiving property for transportation * * * shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, * * * for the full actual loss, damage or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation or in any tariff filed with the Interstate Commerce Commission and any such limitation without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void * * *".

1916. "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property * * * concerning which the carrier shall have been or shall be expressly authorized or required by order of

the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *".

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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 548.

H. B. V. SMITH, C. D. RAFFERTY AND H. S. McCORMICK, CO-PARTNERS TRADING AS H. J. BAKER & BRO.,

Appellants and Cross-Appellees,

vs.

MOTORSHIP "FERNCLIFF", GLITTRE AKTIESELSKABET AND FEARNLEY & EGER,

Appellees and Cross-Appellants.

ON A CERTIFICATE, AND AMENDED CERTIFICATE, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

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TABLE OF CONTENTS.

	PAGE.
Official Reports of the Opinions Below	1
Jurisdiction	2
Questions Certified to This Court	2
Statement of the Case	2
Summary of Argument	4
First Point—	
The Invoice Cost Valuation Clause Involved Herein Is Valid and Binding Upon the Parties Without Reference to a Choice of Rates. The First Question Should Be Answered "Yes"	6
Comments on Appellants' Brief	17
Second Point—	
The Damages Under the Invoice Cost Valuation Clause Should Be Ascertained by Deducting the Value of the Damaged Goods in Their Damaged Condition at the Time and Place of Delivery from the Invoice Cost Valuation as Fixed by Such Clause. The Second Question Should Be Answered "Yes"	34
Third Point—	
The True Measure of Damages Under an Invoice Cost Valuation Clause Is Not Determined by the Application to the Invoice Value of the Percentage of Loss Based on the Difference Between Sound Value and Damaged Value. The Third Question Should Be Answered "No"	40

TABLE OF CASES.

PAGE.

Ansaldo Sangiorgio II vs. Rheinstrom Bros. Co., 294 U. S. 494, District Court, 3 Fed. Supp. 579 4, 5, 6, 7, 10, 11, 17, 21, 22, 29, 36, 37, 39, 40, 41, 46

Asuarca, The, 13 Fed. (2nd) 222 4, 7, 11, 29

Cardiganshire, The, 9 Fed. (2d) 416 38

Carib Prince, The, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181 32

Chicago, Milwaukee & St. Paul Rwy. Co. vs. McCaull-Dinsmore Co., 253 U. S. 97 4, 6, 11, 18, 20, 21, 29

City of Clarksville, The, 94 Fed. 201 32

Coleman vs. N. Y., N. H. & H. R. Co., 215 Mass. 45 5, 10

Craig vs. Continental Ins. Co., 141 U. S. 638 32

Crutchfield & Woolfolk vs. Hines, (Mass.) 131 N. E. 340 38

Davis vs. Zimmern, 211 Ala. 63, 99 So. 307 12

Denver & R. G. R. Co. vs. Peterson Grocery Co., 59 Colo. 125, 147 Pac. 663 13

Duplan Silk Co. vs. Lehigh Valley R. Co., 223 Fed. 600 45, 47

Ellerdale, The, 10 Fed. (2nd) 53 4, 7, 29

Fahey vs. B. & O. R. R. Co., 139 Md. 161 25

Ferncliff, The, 22 Fed. Supp. 728 1, 3, 5, 29, 47, 48, 49

Gratiot Street Warehouse Co. vs. Missouri, K. & T. Ry. Co., 124 Mo. App. 545, 102 S. W. 11 16

Grubbs vs. The Atlantic Coast Line, 101 S. C. 210, 85 S. E. 405 16

Gulf C. & S. F. R. Co. vs. Texas Packing Co., 244 U. S. 31 4, 5, 7, 11, 21, 28, 35

Hadji, The, 18 Fed. 459 11

Hart vs. Penn. R. Co., 112 U. S. 331 14, 42

PAGE.

International Nav. Co. vs. The Atlantic Mutual Ins. Co., 100 Fed. 304 ——— 44, 47
Jason, The, 225 U. S. 32 ——— 34
Kansas City etc. etc. R. Co. vs. Carl, 227 U. S. 639 ——— 17
Kilthau vs. International Mer. Marine Co., 245 N. Y. 361 ——— 5, 14, 15
Knott vs. Botany Mills, 179 U. S. 69 ——— 32
LaBourgogne, The, 210 U. S. 95 ——— 33
Liverpool etc. Steam Co. vs. Phoenix Ins. Co., 129 U. S. 37 ——— 31
Lydian Monarch, The, 23 Fed. 298 ——— 27, 37
Maine, The, vs. Williams, 152 U. S. 126 ——— 31
Matter of Bills of Lading, 14 I. C. C. 346 ——— 28
Matter of Bills of Lading, 52 I. C. C. 671 ——— 22, 23
Mauretania, The, 84 Fed. (2nd) 408 ——— 27
Merauke, The, 31 Fed. (2nd) 974 ——— 5, 11, 14, 15
Moore vs. American Transp. Co., 24 How. 1, 16 L. Ed. 674 ——— 32
~~National Casket Co. vs. So. Ry. Co., 31 I. C. C. 678~~ ——— 14
N. Y. C. & H. R. R. Co. vs. Fraloff, 100 U. S. 24 ——— 31
Oneida, The, 128 Fed. 687 ——— 4, 5, 7, 11, 15, 21, 28, 43
Pearse vs. Quebec Steamship Co., 24 Fed. 285 5, 17, 36, 46, 47
Penn. R. R. Co. vs. Olivit Bros., 243 U. S. 574 4, 5, 7, 11, 21, 28, 36
Phoenix Ins. Co. vs. Erie & Western Transp. Co., 117 U. S. 312 ——— 4, 7, 11, 21, 28
Republic, The, 61 Fed. 109 ——— 33
Richardson vs. Harmon, 222 U. S. 96 ——— 31
St. Johns N. F. Shipping Co. vs. S. H. Companhia Geral Com., 263 U. S. 119 ——— 48
Shaffer & Co. vs. Chicago, R. I. & Pac. Rwy. Co., 21 I. C. C. 8 ——— 5, 9, 14, 22, 24
Southwark, The, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65 ——— 32

PAGE.

Strauss vs. Canadian Pac. R. Co., 254 N. Y. 407 — 21
Styria, The, 101 Fed. 728 — 24
Union Pacific R. Co. vs. Burke, 255 U. S. 317 — 19, 21
Western Transit Co. vs. Leslie, 244 U. S. 448 — 22, 27
Willdomino, The, 300 Fed. 5, affirmed 272 U. S. 718 — 32

STATUTES CITED.

British Marine Insurance Act 1906, Sec. 71 — 43
Carriage of Goods by Sea Act, Act of April 19th, 1936, Ch. 229, 49 Stats. 1207, 46 U. S. C. A. Sec. 27 — 30, 33, 34
Corpus Juris, Vol. 50, Sec. 62, p. 859 — 7, 28
Cummins Amendments, Acts of March 4th, 1915, and Feb. 28th, 1920, 49 U. S. C. A. — 20, 25, 29, 30
Fire Statute, 46 U. S. C. A. Sec. 182 — 32
Harter Act, Act of February 13th, 1893, Ch. 105, Sec. 1, 27 Stats. 445, 46 U. S. C. A. 190-195 — 31, 32
Interstate Commerce Act, 49 U. S. C. A., Sec. 25, sub-sec. 4 — 29
Judicial Code, Act of February 13th, 1925, Sec. 239, 28 U. S. C. A., Sec. 346 — 2
Limitation of Liability Statutes, Act of March 3rd, 1851, Ch. 43, 9 Stat. 635, 46 U. S. C. A. 181-189 — 31

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Rudolph, on York Antwerp Rules, p. 102 — 43
Sharfman, "The Interstate Commerce Commission" — 28
Winter, on Marine Insurance, p. 1314 — 43, 47
York Antwerp Rules, 1924, Rule 16 — 43, 44

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 548.

H. B. V. SMITH, C. D. RAFFERTY AND H. S. McCORMICK, CO-PARTNERS TRADING AS H. J. BAKER & BRO.,

Appellants and Cross-Appellees,

vs.

MOTORSHIP "FERNCLIFF", GLITTRE AKTIESELSKABET AND FEARNLEY & EGER,

Appellees and Cross-Appellants.

ON A CERTIFICATE, AND AMENDED CERTIFICATE, FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEES AND CROSS-APPELLANTS.

I.

OFFICIAL REPORTS OF THE OPINIONS BELOW.

The opinions of the District Court of the United States for the District of Maryland are reported in 22 Fed. Supp. 728.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 239 of the Judicial Code as amended by Act of 13th February, 1925, U. S .Code, Title 28, sec. 346, which provides:

> "In any case * * * in a Circuit Court of Appeals * * * the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause * * *".

III.

THE QUESTIONS CERTIFIED TO THIS COURT.

1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

IV.

STATEMENT OF THE CASE.

The appellants herein filed a libel in admiralty to recover for damages to shipments of fish meal carried on the Motorship Ferncliff, from ports in Japan to ports in the United States. After trial, the District Court found

that the damage was caused by the appellees' negligence and decreed payment therefor.

The shipments were carried subject to bills of lading, Clause 23 of which reads:

> "All claims for which the ship and/or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No value was declared by the shipper nor was a lower or choice of rates offered. (See Certificate and its Amendments.)

In computing the damages, the District Court deducted the damaged value per ton from the invoice value per ton and awarded the difference between the two. No other considerations entered into the computation, for the reason that the invoice value represented the cost of the goods plus the freight and insurance premiums. (22 Fed. Supp. at 741-2.)

Appellants contend that the proper method of computation of damages under an invoice cost valuation clause is to find the percentage of damage by taking the proportion which the damaged value bears to the sound value and then applying that percentage to the invoice value.

Appellants did not challenge the validity of the invoice clause, as such, by assignment of error, and in fact said at page 15 of its main brief:

> "The validity of the clause, if properly construed, is not challenged on this appeal. Appellants do challenge, however, the *effect* given to the clause by the District Judge."

The question of its validity on appeal was first raised by questions from the bench, and it was not even then contended that the clause was invalid. The application and effect of the clause, are wholly apart from its validity.

Upon the argument of this case, and also raised for the first time in the Circuit Court of Appeals, the statement was made that the method of computation contended for by the appellants has been generally employed in estimating cargo damage since the decision in *The Ansaldo San Giorgio I v. Rheinstrom Brothers Co.*, 294 U. S. 494. No evidence, however, nor mention of this contention appears in the record or briefs, and the statement was promptly challenged as shown by the *Amended* Certificate and is incorrect in fact.

V.

SUMMARY OF ARGUMENT.

An invoice cost valuation clause which measures, rather than limits, the recovery by the shipper in the event of damage, is valid and binding upon the parties, and has been enforced by this and lower courts for over a period of sixty years. *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312, (6 Sup. Ct. Rep. 750); *Gulf Colorado & c Ry. v. Texas Packing Co.*, 244 U. S. 31; *Pennsylvania R. R. Co. v. Olivit Bros.*, 243 U. S. 574; *The Oneida*, 128 Fed. 687 (C. C. A. 2), cert. denied 194 U. S. 632; *The Ellerdale*, 10 F. (2d) 53 (C. C. A. 2); *The Asuarca*, 13 Fed. (2d) 222, as well as by the majority of State Courts. L. R. A. 1918 B, 720. Such a clause does not limit nor reduce the carrier's common-law liability for negligence. L. R. A. 1918 B. p. 720, but rather guards the parties against fluctuations in the market while the goods are in transit, *Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company*, 253 U. S. 97; *The*

Oneida, supra; The Ansaldo San Giorgio I v. Rheinstrom Brothers Co., 294 U. S. 494, and 3 Fed. Supp. 579, and is inserted for the benefit of both parties, *The Oneida, supra.* The clause is not offensive to public policy. *The Ansaldo, supra,* (D. C. Op.); *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8; *Coleman v. N. Y. N. H. & H. R. Co.*, 215 Mass. 45. Neither this nor any other Federal Court has held that a choice of rates is necessary to sustain its validity. *The Ansaldo, supra* (Sup. Ct. and D. C.); *Gulf, Colorado &c Ry. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra; The Oneida, supra;* nor is a special consideration necessary to support it, *Gulf, Colorado &c. Ry. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra; The Oneida, supra; The Ansaldo, supra,* (D. C.); L. R. A. 1918 B, supra. But if it is, then the agreement by the carrier to indemnify the shipper for his full, actual loss, even though the market value had fallen below the invoice value while the goods were in transit, would be sufficient consideration. *The Merauke*, 31 F. (2d) 974; *Kilthau v. International Mercantile Marine Co.*, 245 N. Y. 361.

The language of the clause requires that the measure of damages contended for by Appellees be applied. *Gulf, Colorado etc., Ry Co. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra; Pearse v. Quebec Steamship Co.*, 24 Fed. 285; *The Ferncliff* (D. C.), *supra.* This rule has been universally applied by the courts. The *Ferncliff*, (D. C.) *supra; The Ansaldo* (D. C.) *supra.* The rule contended for by the Appellants has never been applied in any court in a similar case and counsel for Appellants have frankly admitted this. *The Ferncliff* (D. C.) *supra.*

Note: *Italics throughout this brief are ours.*

First Point.

THE INVOICE COST VALUATION CLAUSE INVOLVED HEREIN IS VALID AND BINDING UPON THE PARTIES WITHOUT REFERENCE TO A CHOICE OF RATES.

THE FIRST QUESTION SHOULD BE ANSWERED "YES".

The certificate from the Circuit Court of Appeals has very properly termed the clause in question *"a true valuation clause"* and as such it has been distinguished by this Court in *The Ansaldo San Giorgio I v. Rheinstrom Brothers Co.*, 294 U. S. 494, from a limitation clause. The distinction between them is, that the latter inures solely to the benefit of the carrier, whereas the former may result equally in benefit either to the shipper or to the carrier. In no sense does it limit the recovery to an arbitrary sum but instead constitutes the basis for an award of damages commensurate with the loss. *Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company, supra.* There, the Court held (p. 99):

> "Before the passage of this amendment (Cummins Amendment) the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of the goods but merely offering the most convenient way of finding the value. *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, 12. * * *
>
> We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule."

The bill of lading in that case provided (p. 98):

> " 'the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid'."

In *The Assaldo, supra,* (p. 497) this Court said:

> "It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time."

This Court for a period of over fifty years has rightly recognized that the validity and consequent enforcement of the terms of such a stipulation is equitable and has given the clause full effect. *Phoenix Ins. Co. v. Erie & Western Transp. Co., supra; Gulf, Colorado &c Ry. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra; The Oneida, supra; The Ellerdale, supra; The Asuarca, supra.* The inference is that this stipulation does not offend, but, on the contrary, is consonant with public policy. The term public policy has been the subject of many considered opinions by the Courts, all of which may be summed up generally by the statement that "public policy is that principle of the law which holds that 'no one' can lawfully do that which has a tendency to be injurious to the public or against the public good". 50 Corpus Juris, Sec. 62, p. 859. If the enforcement of this clause was in fact inconsistent with public policy, this Court would certainly not have

given it sanction. Any other conclusion would do violence to such long established approval.

In fact, the operation of this clause is not harmful to "the public good". It constitutes a perfectly valid contract by the terms of which the shipper agrees to accept the value with which he has parted, waiving any right to profits, in consideration of the carrier agreeing to indemnify the shipper for his loss up to the full amount of such actual loss. In fact, the carrier underwrites the recovery by the shipper of that with which the shipper has parted. To illustrate: if the market value of the commodity does not vary during transit, then, in the event of loss or damage, the shipper will receive from the carrier the cost to him of the goods, as of the time and place of shipment. If, however, the market price of the merchandise has depreciated during transit to a point below the invoice cost, the shipper would still receive the full amount of his actual loss.

Illustrations.

In the event the market value remains the same:

Market value	$36.00
Invoice value	32.50
Damaged value	25.00

the recovery, without the clause, would be the difference between $36.00 and $25.00—or $11.00 per ton. Under the clause, the recovery would be the difference between $32.50 and $25.00—or $7.50 per ton.

In case of fall of market:

Market price	$30.00
Invoice price	32.50
Damaged value	19.00

The above is on the assumption that the damaged value would depreciate in the same proportion to the sound market value.

The recovery, without the clause, would be the difference between $30.00 and $19.00—or a difference of $11.00 per ton. Under the clause, the recovery would be the difference between $32.50 and $19.00—or $13.50 per ton.

Under the operation then of the invoice value clause, the benefit may accrue equally to the carrier or to the shipper, depending upon the rise or fall of market conditions. This reciprocal benefit is sufficient to sustain the validity of this clause.

It would not be claimed that the situation was offensive to public policy where the market falls and by similar reasoning the same should be said of the situation where the market rises. The statement in an opinion by the Interstate Commerce Commission, *Shaffer & Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8, seems apt:

> "It was found upon consideration of the entire matter that it would be the wiser policy to adopt the value of the commodity at the time and place of shipment, and especially to accept the invoice value. This renders the ascertainment and adjustment of damages comparatively easy, and tends materially to check the litigious prosecution of exaggerative claims of damage. *Moreover, it must be remembered that, although the rule works to the advantage of the carrier when the market price has advanced subsequent to the date of shipment, it benefits the shipper in case the market price at destination should decline; and it seems fairly probable that in the long run the rule would be of advantage to the shipper as often as it is to the carrier.*"

See also *Coleman v. N. Y. N. H. & H. R. Co., supra*, where the Court, in construing such a clause, held:

> "It was a reasonable contract to base the damages to be recovered in case of loss upon the genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract."

To pursue the public policy aspect a bit further, we need but call the attention of this Court to the fact that practically every form of insurance, both marine and general, operate upon the principle that in event of loss the *bona fide* value of the property, as stated by the assured, is that value for which reimbursement is made. If a parcel of real property bought for speculation is valued at and insured for the sum of $10,000 and at the end of six months a total or partial loss occurs, the basis for measuring the damage is the sum of $10,000 irrespective of the fact that the value of the property may have materially increased during that period. The same would be true of insurance on the stock in trade of a merchant. The articles were certainly stocked by him for the purpose of making a profit. If they are valued at $5,000 and subsequently and after appreciation in value they are destroyed, that loss is measured by the *bona fide* value of the goods as stated in the insurance policy. There is no difference in principle, insofar as public policy is concerned, between these illustrations and the enforcement of an invoice valuation clause. Both agreements have fixed a value which will make the recipient whole.

This Court stated in *The Ansaldo, supra*, (p. 498):

> "There is much to be said in favor of an agreement by which the parties adopt an agreed value as a measure of recovery for loss or damage to goods not delivered by the carrier or damaged in transit."

There is no apparent reason why the validity of this clause should depend upon a choice of rates. This choice was not made the basis for computing the damages under the terms of the invoice cost valuation clauses in the *Phoenix Ins. Co. v. Erie & Western Transp. Co., supra; Gulf, Colorado &c Ry. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra;* but, on the contrary, it appears that there was in fact no choice granted the shippers. This is true, too, of other Federal Court decisions dealing with the same clause. *The Hadji,* (D. C. S. D. N. Y.), 18 Fed. 459; *The Oneida, supra; The Ansaldo* (D. C.) *supra; The Asuarca, supra.*

The acceptance of the validity of this valuation clause, irrespective of a choice of rates or special consideration, in every reported Federal case except that of *Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company, supra* (which will be distinguished later in this brief) cannot be lightly cast aside or ignored. The continued recognition of validity is persuasive, and there is no reason to believe that counsel over such a long period of time would repeatedly press, and the Courts affirm, the contention that a limitation clause depends for its validity upon a choice of rates and not press the same contention with respect to an invoice cost valuation clause. There must be, and there is, a substantial difference, and the conclusion is logically irrefutable that the invoice cost clause is not dependent for its validity upon a choice of rates.

Only two Federal cases have discussed this point and *both* held that the validity of the clause did not depend upon a choice of rates, *The Ansaldo* (D. C.) *supra; The Merauke, supra.* In the former the court said (p. 581):

"There is a substantial difference between an agreement that damages shall be adjusted on the basis of invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation clause at all, but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. *The difference was noted in the Merauke Case and in the Kilthau Case, and the intimation in both opinions is that a provision for computing damages by reference to invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.*"

* * * * * *

"There is abundant authority for the proposition that the clause as it stands is valid. *For years the cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given.*"

In *Davis v. Zimmern*, 211 Ala. 63, 99 So. 307, the Court, after citing several cases and particularly an earlier Alabama case, said:

"The decision there was that the stipulation, being reasonable and enforceable on its face, was applicable to loss from the carrier's negligence, *and required no special consideration to support it.*"

The Court in that case dealt with the matter very fully and said:

> "Dealing with this identical stipulation, the following cases hold it as valid and enforceable against negligent loss or injury, *and without any special consideration—as a reduced freight rate—to support it:* Denver, etc., R. Co. v. Peterson Co., 59 Colo. 125, 147 Pac. 663; Gratiot St. Warehouse Co. v. M., K. & T. Ry. Co., 124 Mo. App. 545, 102 S. W. 11; Wallingford v. A. T. & S. F. Ry. Co., 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716; Bowman-Kranz Lbr. Co. v. Bush, 104 Neb. 165, 176 N. W. 91; F. W. Brockman, etc., Co. v. Mo. Pac. Ry. Co., 195 Mo. App. 607, 188 S. W. 920; Coleman v. N. Y., etc., R. Co., 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; Grubbs v. A. C. L. R. R. Co., 101 S. C. 210, 85 S. E. 405; Inman v. S. A. L. R. Co. (C. C.) 159 Fed. 960."

This doctrine was also set forth in *Denver & R. G. R. Co. v. Peterson Grocery Co.*, (S. Ct. Colo.) 59 Colo. 125, 147 Pac. 663. That Court, after stating that there was no reduced freight rate, said:

> "In volume 4, Elliott on Railroads (2d Ed.) §1510a, volume 5, Am. & Eng. Ency. of Law (2d Ed.), p. 335, volume 6, Cyc. p. 401, and volume 1, Hutchinson on Carriers (3d Ed.), §430, the conclusion stated on this subject, in substance, is that the great weight of authority supports the validity of such stipulations where they have been freely and fairly entered into, whether the loss be the result of the carrier's negligence or not, *and that it does not require a reduced freight rate to sustain it.* This conclusion appears to be supported by many of the later decisions."

There can be no doubt that the contract in the present case was "freely and fairly entered into", because the bills of lading were prepared by the shipper on its own form.

The validity of this clause was before the Interstate Commerce Commission on numerous occasions. After a very full investigation, looking to both the legality and convenience of a valuation clause, the Commission adopted and recommended a bill of lading containing such a clause. 14 I. C. C. 346.

A subsequent investigation was made by the Interstate Commerce Commission and its report is to be found in *The Shaffer case*, 21 I. C. C. p. 8, (see quotation therefrom on page 9 of this brief).

Subsequently, and after the passage of the Cummins Amendments (1915 and 1916, Act of March 4, 1915, 38 Stat., 1196; Act of August 9, 1916, 39 Stat. 441, 49 U. S. C. A., Sec. 20, Sub-Sec. 11), the Interstate Commerce Commission held that the clause was still valid and not forbidden by law. ~~*National Casket Co. v. So. Ry. Co.*, 31 I. C. C. 678, 693.~~ *In re The Cummins Amendment*, 33 I. C. C. 682, 693

An invoice cost valuation clause should not be construed as a limitation upon or an agrement reducing the carrier's common-law liability. Even if it should be so construed that would not affect its validity, for the reason that it is supported by a consideration in the form of the guaranty to the shipper of a recovery equal to the value with which he has parted. This consideration is equivalent to a choice of rates and was recognized as such by the Circuit Court of Appeals, for the Second Circuit, in *The Merauke*, 31 F. (2d) 974, C. C. A. (2), and *Kilthau v. International Mercantile Marine Co.*, 245 N. Y. 361, and as such would be binding on the shipper on the estoppel theory outlined by the Court in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331. In the *Merauke* case, it was sought to *limit* damages to the invoice value not exceeding $100

per package. The Court held this to be a limitation clause but recognized that if the invoice cost had been fixed as the *measure* of damages, then such clause would be valid, saying at p. 975:

> "Why should the carrier be permitted to say this, unless the shipper is offered some advantage in return as by giving him an alternative in freight rate, *or by agreeing to accept the invoice cost as the measure of the value* of the goods at port of destination?"

Libellant-appellant in The Merauke case recognized this difference and stated at p. 6 of the main brief and p. 1 of the reply brief as follows:

(p. 6):

> "In *The Oneida*, 128 F. 687, the clause considered was essentially different from the present one, in that it provided an absolutely agreed valuation, available to both shipper and carrier, irrespective of whether the goods were worth more or less at destination than at the point of shipment."

(p. 1):

> "The appellee does not distinguish this case, where the invoice cost clause is merely a gratuitous limitation of the carrier's liability, from the cases in which the invoice value clause constituted an agreed valuation of the goods, binding on both shipper and carrier."

In the *Kilthau* case, the clause also provided that the invoice value was the *limit* but not the *measure* of damages. If the clause had measured rather than limited the damages, it would have been valid. The Court there said at p. 363:

> "If the parties here have agreed that such invoice value should be the basis for fixing damages in all

> cases, it might perhaps be said that the valuation and consequential limitation was not arbitrary and should be enforced."

The validity of this clause has been questioned in the various State Courts, both with and without a choice of rates. An exhaustive note in L. R. A. 1918 B, 720, reviews these decisions and concludes:

> "And it has been expressly held, perhaps by the majority of cases which have discussed this point * * * that it does not require a reduced freight rate or other special consideration to sustain it * * *."

In *Grubbs v. The Atlantic Coast Line*, 101 S. C. 210, 85 S. E. 405, an invoice cost valuation clause was in issue. The Supreme Court of South Carolina held:

> "The bill of lading does not show that there was an agrement that, in consideration of a reduced rate on shipment, the amount of recovery in case of loss would be limited to a specified amount. On the contrary, the language of the bill of lading negatives any such agreement. The provision in the bill of lading was merely intended to establish a rule for determining the value of the property in case of loss, irrespective of the fact whether it was greater at the point of shipment or destination, which could not be foreseen, on account of the fluctuation in prices."

To the same effect see *Gratiot Street Warehouse Co. v. Missouri K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11, in which the Court, after stating the measure of damages ordinarily applying, said:

> "Notwithstanding this doctrine, however, the provisions of such contracts limiting the measure of recovery to the value or cost of the goods at the time and place of shipment have frequently been sustained by this court as valid, when they have been freely and

fairly made, even though the loss occurs from the carrier's negligence *and the stipulation is not supported by a reduced rate of freight or other special consideration.* It is said that, while it is not competent for the carrier to contract for an exemption of liability arising on account of its own negligence, it is competent for it to contract the loss shall be measured by the standard of cost or value at the time and place of shipment."

COMMENTS ON APPELLANTS' BRIEF.

Appellants discuss the decision of this Court in *The Ansaldo,* particularly at pages 7 to 9 inclusive. A complete answer to what has been said there may be found in *Pearse v. Quebec Steamship Company,* 24 Fed. 285. Judge Brown in that case really anticipated the decision of this court and there is a striking similarity between the contentions made by the respondent in that case and the addition of the words 'of the entire shipment' in *The Ansaldo.* In the *Pearse* case the respondents contended that an invoice cost valuation clause should be construed "as limiting their responsibility to the invoice value of the shipment as a whole; and that the carriers are not to be liable for any loss or damage, provided the shipper ultimately realizes at the port of destination the whole invoice value." There, as in *The Ansaldo,* the amount realized upon the sale of the sound and damaged merchandise was considerably more than the invoice value of the whole shipment.

Judge Brown refused to give effect to respondents' contentions and recognized, as this court did in *The Ansaldo,* that an invoice cost valuation clause is interpreted by applying the value distributively upon each article damaged. Judge Brown said at page 288:

"The limiting clause in this case must be construed as applying distributively upon each article damaged, because that is the most natural meaning of the words, and that best accords with the presumed intention of the parties. The clear intent was to provide not merely for the loss of the whole shipment, or for damage to the whole shipment, but for the loss of any part, and for damage to any part. When it is stipulated that in case of damage or loss, the ship-owner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only; otherwise the clause would not be valid. The law makes the carrier liable for the loss or damage of any goods through his own negligence. Any stipulation that would annul this liability is void. If the carrier should be allowed, in ascertaining the amount for which he was liable, to charge against the invoice price of the whole the amount realized in a foreign market for the whole cargo, damaged and undamaged, that construction would be giving to the carrier the full benefit of the foreign market value, which is expressly denied to the shipper,—a result not presumably within the intention of the parties, and at variance with one of the reasons for upholding the clause in question, namely, the fixity and certainly it affords for the computation of damages.

"If the construction contended for by the claimants were the proper meaning of this limiting clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to the theft or non-delivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole,—a result destructive of all commerce, because enabling the carrier to appropriate all its profits."

The cases relied upon by appellant do not sustain the point for which they are cited and are readily distinguishable. Much stress is put upon *Kansas City, etc., etc., R. Co. v. Carl*, 227 U. S. 639. The quotation from the Court's opinion, on page 650, is directed to a clause which, within the definition of the *Ansaldo*, requires a choice of rates for its validity. It is purely one of limitation to an agreed value, limiting rather than measuring the damage and offering no concurrent or reciprocal benefit to the shipper.

Union Pacific R. Co. v. Burke, 255 U. S. 317. Apparently the appellant has misconstrued the facts and holding of this court in that case. That case involved water and rail carriage from Yokohama to a point east of San Francisco. But one bill of lading was issued and that by the water carrier which contained a clause limiting value in case of loss to $100 per package. The goods arrived safely at San Francisco and were thence forwarded on the line of the Union Pacific Railroad Company during which transit the goods were destroyed. The uniform bill of lading, not issued, but stipulated to apply for the rail carriage, contained an invoice cost valuation clause which provided:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon * * *."

There was but one rate applicable to the shipment as it was carried east of San Francisco.

Under this set of facts the carrier contended that the agreed valuation of $100 in the ocean bill of lading was the "lower value" or value "agreed upon". The effect of this contention, if accepted by the court, would have been to substitute a strict limitation agreement for the invoice cost valuation agreement and under the doctrine of the cases cited therein that would require a choice of rates, and the court rightly refused to give its sanction.

The court did, however, award a sum equal to the invoice value sued for. This sustains, we think, the argument that while a true limitation agreement requires a choice of rates in order that it be operative, an invoice cost valuation clause does not.

At page 9, appellant says: "The first question in the certificate from the Court of Appeals of the Fourth Circuit now asks this court to determine the validity of an invoice value clause." This statement should be corrected by adding *"inserted in a marine bill of lading."* The importance of this correction will be discussed.

The Cummins amendment, 1915, considered in *Chicago M. & S. Co. v. McCaull-Dinsmore*, 253 U. S. 97, and the holding of this court therein have no application whatever to the first question certified. The McCaull case involved an action by a shipper to recover the market value of goods damaged in transit by a rail carrier. The carrier set up an invoice cost valuation clause as a defense and contended that it should measure the damages. This court refused to give effect to that clause on the ground that it was a violation of the Cummins Amendment. The court said at page 100:

> "It seems to us, therefore, that the decision below was right, and as, in our opinion, *the conclusion*

is required by the statute, neither the convenience of the clause, nor any argument based upon the history of the statute or upon the policy of the later act of August 9, 1916, c. 301, 39 Stat. 441, can prevail against what we understand to be the meaning of the words."

The Cummins Amendment, of course, applies only to interstate carriers and not to ocean carriers and accordingly has no application to the bill of lading issued by the latter, *Union Pacific v. Burke, supra.* At common law and before the enactment of this amendment and this court's decision in *Chicago v. McCaull* the rights, duties and liabilities of interstate and ocean carriers were, in this respect, identical. In actions which arose prior to the amendment an invoice cost valuation clause, both in rail and water bills of lading, was valid and enforced. *Phoenix Insurance Co. v. Erie & Western T. Co., Pennsylvania Railroad Company v. Olivit, Gulf C. & S. R. Co. v. Texas Packing Co., The Oneida, supra.* Before the Cummins amendment such a clause as the one in question was valid and enforceable and inasmuch as the Cummins Amendment related only to rail and other interstate carriers and not to ocean carriers, it cannot be argued that the McCaull case, or the amendment, have any application to such a clause inserted in a marine bill of lading. In fact the McCaull case did not attempt to decide the validity of such a clause not controlled by the Amendment. *The Ansaldo, supra.*

The last case cited by appellants, *Straus v. Canadian P. R. Co.*, 254 N. Y. 407, is clearly distinguishable. The clause, set out in appellants' brief, is clearly one of strict limitation. Absolutely no benefit would accrue to the shipper. Under the terms thereof, if the market value

was less than the invoice value, then the market value was the basis of recovery. If the invoice value was less, that was the basis. In any event, regardless of invoice or market price, the maximum limitation was $100 for any one package. We do not believe the District Court in *The Ansaldo* case was required to say that the *Straus* case was "opposed to the great weight of authority."

What has been said by the appellant with respect to *Western Transit v. Leslie*, 244 U. S. 448, has no application to the first question certified. There the court had to deal with a strict limitation clause.

At page 19 the appellant makes the statement that the report of the Interstate Commerce Commission in *Shaffer Railroad Co.*, 21 I. C. C. 8, supra, upholding the validity of invoice cost valuation clauses without reference to a choice of rates was overruled by the report "In *Matter of Bills of Lading*," 52 I. C. C. 671, 710, "after the Cummins amendments of 1915 and 1916" and appellant contends, after discussing the many state court decisions based allegedly upon the Shaffer case, that it may well be doubted whether the clause would have been upheld after the latter report. It has been shown that the Cummins amendment applies only to interstate and other carriers subject to the provisions of the Interstate Commerce Commission with no application whatsoever to ocean carriers, and it may well be said that the decisions in such cases, and reasons therein announced, are as applicable to the present instance as they were before express statutory enactment prohibiting the enforcement of the clause insofar as it applied to rail carriers.

We need but refer to the uniform forms of bills of lading annexed by the Interstate Commerce Commission as Appendices B and D of its report in 52 I. C. C. *supra*. The Commission recognized the distinction between water and rail carriers and accordingly recommended a different form of valuation clause with respect to each, making a choice of rates unnecessary to the former and necessary to the latter. The clause in the proposed form dealing with rail carriers as such found in Appendix B is as follows:

> "Sec. 2 * * * If the property covered by this bill of lading is hidden from view and the shipper has specifically stated in this bill of lading the value of the property, no carrier shall be liable beyond the amount so specifically stated, whether or not the loss or damage occurs from negligence: *Provided*, In all cases not prohibited by law, that where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence."

The recommended export form of bill of lading, Appendix D, which, of course, applies to ocean carries, contains the following:

> "The amount of any loss, damage, including loss or damage arising from delay for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any

> of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The Interstate Commerce Commission then in this report, which overrules the report in the Shaffer case, *supra*, recognizes the fact that the Cummins amendment applies only to rail and interstate carriers and does not apply to ocean carriers and accordingly recommended a form of bill of lading which contained an invoice cost valuation clause *not dependent upon a choice of rates for its validity*. As a matter of fact the shippers in the hearing before the Commission recommended substantially the same form of clause and without reference to a choice of rates, page 709.

The first question certified is before this court under rather unusual circumstances, both factually and chronologically. The invalidity of this clause was not contended for in the Circuit Court of Appeals. There is no assignment of error pertaining thereto and appellants brief admitted its validity attacking only its application. Upon the argument in the Circuit Court of Appeals counsel for appellant was asked from the bench whether or not the validity of the clause was doubted. Even then no clear-cut denial was made. Counsel stated that the clause itself was not attacked, but only the computation of damages under it. It may reasonably be said that its acceptance by counsel did not constitute an oversight, but was rather an acknowledgement of the existing law.

At page 17, Appellant says that in The Styria the construction of the clause and computation of damages is at variance with Appellees contention. This is not so. The Styria held the clause therein involved to be

one of limitation and void and, therefore, awarded the difference between market and damaged value.

At pages 20-1, Appellant cites four State Court cases as in conflict with Appellees contention. These cases were decided prior to the Olivit and Gulf cases, supra, and it is reasonable to assume that this court therein in effect overruled prior cases which were decided on the theory that they were contractual limitations of liability and therefore void.

At page 23, the statement that the State Court decisions mentioned by the District Judge in The Ansaldo case, no longer are authority for the validity of this clause, requires amplification. It is perhaps true that because of the Cummins Amendment a different result would be reached, *but* the principles announced therein, in the absence of statute, are still cogent and authoritative and still apply to water carriers. In *Fahey v. B. & O. R. R. Co.*, 139 Md., 161, at page 163, the court said:

> "The defendant railroad company, on whose line the losses occurred, paid to the plaintiffs the value of the grain at the time and place of shipment. This was the measure of damages prescribed by the bills of lading under which the grain was being transported, but it did not fully compensate the plaintiffs for the losses actually sustained. The liability of the carrier could not be thus restricted unless the grain was intended for export to a foreign country not adjacent to the United States. If it was received for transportation only from one state to another, or was destined for export to an adjacent foreign country, the carrier was prohibited by the Federal Act to Regulate Commerce, and its amendments, from stipulating for recovery of less than the full amount of the actual loss, damage or injury to the property in transit, and the limitation of liability in the bills of lading before us would, under the express

terms of that legislation, be null and void. 38 Stat. at L., 1196; Comp. Stat., sec. 8604a; 39 Stat. at L. 441. *In this suit to recover for losses in addition to those for which payment was made as provided by the bills of lading, the court below ruled that the stipulation therein as to the measure of damages were valid because the grain was intended for export to a non-adjacent foreign country, and the shipments were consequently not within any of the classes of commerce to which the Federal statutes apply.* Evidence tending to support a larger measure of recovery was, therefore, excluded, and a verdict in favor of the defendant was directed."

At p. 24, par. 1, Appellants state that the depreciation of the sound market value below invoice value would be unlikely. We have cited two cases under the Second Point herein illustrating just that situation and, therefore, appellants' argument loses its effect. Appellants state further that the shipper would not have had the opportunity of a choice of rates " • • • which has been held essential in upholding a limitation agreement • • •." As *The Ansaldo* case pointed out this is not "a limitation agreement" and secondly we have shown under this Point that a valuation clause requires no choice of rates for its validity.

At the same page and in the same paragraph it is argued that the option of the carrier to replace lost or damaged goods takes from the shipper the benefit which would accrue to him in case of a depreciated market price. The answer to this is that if such option were exercised then the shipper would be in exactly the same position as if there had been no loss, that is, he would be in the possession of sound merchandise. In any event this portion of the second sentence, which is in itself entirely separate from the first sentence of the clause, does not

affect the validity of the measure of damages provided for in the first sentence. Even if we assume that the latter part of the second sentence is invalid this court could, without reference thereto in any way, uphold the validity of the first sentence. The sentences are distinct, independent and complete. *The Mauretania*, 84 Fed. (2d) 408 (C. C. A. 2nd C.).

In paragraph two, on the same page, appellants contend that speculative elements of damages because of the rise and fall of the market would not be eliminated under a valuation clause. It is well known that the sale of damaged merchandise does not generally reflect its true value and, therefore, the rise or fall of the sound market value would affect but little the price realized on the damaged value, and inasmuch as the invoice value remains the same, the speculative elements are not present.

In paragraph 3 on the same page the appellants speak of the ease with which market values may be ascertained. Market values of the staple commodities in the largest ports may be determined, it is true, from the exchanges dealing in such staples, such as from the Coffee Exchange or the Sugar Exchange in New York. It should be remembered, however, that carriage under a valuation clause is not limited to the staple commodities nor to the larger ports and it is a matter of common knowledge that in those cases a real difficulty exists in determining market values. In fact in some cases there is no market for certain commodities at the port of destination.

At p. 27, the statements in the second paragraph are untrue. See, for example, *The Lydian Monarch*, 23 Fed. 298, and infra, here, p. 37.

At p. 29, fourth paragraph, Appellant's interpretation of the holding in the *Western Transit Co.* case is errone-

ous. What the court held was that where the damage to a unit was not complete, the value of an entire unit could not be recovered.

The answer to Appellant's statement, fourth paragraph, p. 33, is that, in view of the unvarying application of the clause, the parties could not have intended any other method of calculation.

> "Public policy is that principle of the law which holds that 'no one' can lawfully do that which has a tendency to be injurious to the public or against the public good." (50 Corpus Juris, Sec. 62, p. 859.)

It is submitted that the clause in question demonstrably meets these tests.

Prior to the Cummins Amendment, this Court and the lower Federal Courts upheld the validity of this clause without a choice of rates (*Gulf Colorado &c Ry. v. Texas Packing Co., supra; Pennsylvania R. R. Co. v. Olivit Bros., supra; Phoenix Ins. Co. v. Erie & Western Transp. Co., supra; The Oneida, supra*) and irrespective of whether the bill of lading involved was that of a rail or water carrier.

The Interstate Commerce Commission *"In the Matter of Bills of Lading,"* 14 I. C. C. 346, before the Cummins amendment recognized the validity of, and recommended this clause without reference to a choice of rates. T very persuasive, for as Sharfman in his book ent ..., "The Interstate Commerce Commission", said in his introduction:

> "The underlying significance of the Commission's functions and processes, as they have progressively developed to prevailing scope and character, is to be found *in their bearing upon important matters of economic policy, legal method, and administrative effectiveness.*"

This clause therefore had the sanction of judicial and administrative branches of the Government, and their holdings were therefore in accord with public policy.

The next development was the Cummins Amendment of 1915, followed by that of 1916. This Amendment specifically set forth the invalidity of such clauses as to rail carriers and expressly exempted from its application water carriers, and states, after defining the liability of rail carriers,

> "Provided, that if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water * * *".

The first authoritative decision dealing with this statute was *Chicago, Milwaukee & St. Paul Railway Company v. McCaull-Dinsmore Company, supra,* in which this Court held that the Cummins Amendment forbade such a clause, *as applied to rail carriers,* and did not attempt to determine the question of validity as applied to steamship carriers. Indeed since the *McCaull* case, an invoice cost valuation clause found in a *marine* bill of lading has been construed as binding without a choice of rates, in *The Aswarca,* 13 Fed. (2d) 222; *The Ansaldo* (D. C.); *The Ferncliff* (D. C.); *The Ellerdale, supra.* This being so, there is no justification for contending that its continuance by water carriers contravenes public policy. This becomes more evident by the fact that water carriers were expressly excluded by the language in that statute, as well as by The Interstate Commerce Act, 49 U. S. C. A., Section 25, Sub-section 4. There it was provided:

> "The commission shall, in such manner as will preserve for the carrier by water the protection of

limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading." • • •

"Provided, however, that insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of chapter 27 of Title 46." (Carriage of Goods by Sea Act.)

Three years after the passage of the second Cummins Amendment, the Interstate Commerce Commission held hearings in order that changes might be made in prevailing bills of lading to conform with the amendment. Briefs and testimony were submitted by the great majority of Chambers of Commerce, Average Adjusters Associations, Freight Associations, and major shippers from all over the country. They were represented there by almost one hundred and fifty different counsel or representatives. Present also were representatives from all the Railroads and Railroad Associations of the country. As was to be expected, there was a wide difference in the forms of bills of lading recommended by the two groups, particularly with respect to valuation clauses. That form suggested by the shippers *with respect to rail shipments*, and which provided for a valuation clause dependent for its validity upon a choice of rates, was accepted by the Commission in lieu of that submitted by the carriers. *However*, the invoice valuation clauses submitted by both the shippers and carriers with respect to transportation by water, which were substantially the same, *and neither of which provided for a choice of rates*, were accepted and adopted by the Commission in its recommended form of bill of lading. *Certainly the findings of the Commission, based upon testimony and recommendations of those most intimately affected, are entitled to weight and constitute the*

public policy applicable to this situation. The valuation clauses have been set out *supra.*

If it is assumed that an invoice cost valuation clause is a modification of common-law liability, particularly as applied to *marine* bills of lading, it is submitted that this would be in accord with other statutes and accepted practices in this field of carriage. The Courts have approved, and the Congress has made possible by legislation, limitations of liability of water carriers. A notable example and chronologically the first limitation is to be found in The Limitation of Liability Statutes, 46 U. S. C. A. 181, 189, Act of March 3, 1851, c. 43, 9 Stat. 635, as amended. This Act, passed practically one hundred years ago, was not then new. Mr. Justice Brown, in *The Maine v. Williams,* 152 U. S. 126, and Mr. Justice Lurton, in *Richardson v. Harmon,* 222 U. S. 96, have traced the history of limited liability statutes. This rule was firmly established in Continental Europe by the end of the seventeenth century, later adopted by England and its possessions, and finally adopted by the United States. There can be no doubt that this statute modifies the water carrier's common-law obligations, in that it limits such carrier's liability for the negligent or wrongful acts of its servants. *Liverpool etc. Steam Co. v. Phoenix Insurance Co.,* 129 U. S. 397. It should be noted that this Act *does not* apply to rail carriers. *N. Y. C. & H. R. R. Co. v. Fraloff,* 100 U. S. 24.

The next step in derogation of the water carrier's common-law liability is to be found in the Harter Act, 46 U. S. C. A. 190-195 (Act of February 13, 1893, c. 105, Sec. 1, 27 Stat. 445). Prior to this Act,

> "common carriers, by land or sea, could not by any form of contract exempt themselves from responsi-

bility for loss or damage arising from negligence of their servants, and * * * any stipulation for such exemption was void as against public policy; although the courts in England and in some of the States held otherwise." *Knott v. Botany Mills*, 179 U. S. 69.

Under the terms of the Harter Act, the water carrier may substitute for the absolute warranty of seaworthiness, the duty of using due diligence to make his vessel seaworthy, and "by virtue of this section, liability for losses to cargo, caused by unseaworthiness, may be contracted away provided the owner uses due diligence to make the vessel seaworthy * * * *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65; *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181". (*The Willdomino*, (C. C. A. 3), 300 Fed. 5, at p. 10, Aff'd 272 U. S. 718.)

And further, the carrier is excused from the consequences of the negligence of his servants in the navigation or management of the ship, providing due diligence has been exercised to make the vessel seaworthy.

Another notable instance of the statutory limitation of the ship owner's liability for negligence of his servants is to be found in the Fire Statute, 46 U. S. C. A. 182. The source of this statute was the second section of Act 26, *Geo. III*, C. 86, *The City of Clarksville*, (D. C. Ind.) 94 Fed. 201, 204, and the purpose was to relieve the carrier from an existing liability with respect to the carriage of goods. *Moore v. American Transp. Co.*, 24 How. 1, 16 L. Ed. 674; in that the carrier was not liable for the negligence of its servants but was liable only for damage "caused by the design or neglect of such owner." *Craig v. Continental Insurance Co.*, 141 U. S.

638, 646; *The La Bourgogne*, 210 U. S. 95; *The Republic*, 61 Fed. 109, (C. C. A. 2).

The latest statutory enactment limiting the water carrier's common-law liability for negligence is to be found in the Carriage of Goods By Sea Act, (46 U. S. C. A. §1300-1315, Act April 16, 1936, c. 229, 49 Stat. 1207). §1304 Par. (1) of that Act excuses the carrier and ship for losses "* * * arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, * * *".

Paragraph (2) of the Act (provided there has been due diligence) excuses the carrier and ship from "(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; (b) Fire, unless caused by the actual fault or privity of the carrier; * * * (p) Latent defects not discoverable by due diligence; * * *"

In addition, and what is most significant, is the fact that the Carriage of Goods By Sea Act contains a limitation clause *which is not based upon a choice of rates.*

Paragraph (5) of §1304 of the Act, is as follows:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

The Carriage of Goods by Sea Act is an adoption of the "Hague rules" formulated at the Convention for the Unification of Certain Rules Relating to Ocean Bills of Lading at Brussels, which was attended by representatives from practically every nation. The rules have been adopted by fifteen nations and fifty of the British colonies.

Indeed there are many more examples which could be cited, such as the well-known and judicially approved "Jason clause", dealing with General Average, *The Jason*, 225 U. S. 32, but to exhaust these examples would be merely cumulative.

The fact that our courts, the Congress, the Interstate Commerce Commission, and practically every maritime nation have assented to and accepted limitations of a water carrier's common law liability, without a choice of rates, plainly indicates that such limitations are in accord with, rather than contrary to, public policy. An invoice cost valuation clause is therefore clearly in accordance with and not contrary to public policy.

Second Point.

THE DAMAGES UNDER THE INVOICE COST VALUATION CLAUSE SHOULD BE ASCERTAINED BY DEDUCTING THE VALUE OF THE DAMAGED GOODS IN THEIR DAMAGED CONDITION AT THE TIME AND PLACE OF DELIVERY FROM THE INVOICE COST VALUATION AS FIXED BY SUCH CLAUSE.

THE SECOND QUESTION SHOULD BE ANSWERED "YES".

The certificate says:

> "The invoice cost of the fish meal was $32.50 per ton. The value of the damaged portion of the shipment upon arrival at the port of destination was $25.00 per ton * * * The Court below held the valuation clause valid and computed the damages on the

basis of the difference between the invoice cost ($32.50 per ton) and the value of the damaged fish meal at the time and place of delivery ($25.00 per ton)."

This method of computing damages under an invoice valuation clause has been universally applied by this and every other Court so far as diligent research reveals. The District Court, in its supplemental opinion, said:

"But it is frankly admitted by [appellants] counsel that this [his] method of calculating damages has never heretofore been applied by any court in a case dealing with a clause submitting [substituting] invoice value for market value. On the contrary it is my understanding that the calculation as made in the opinion, which was to deduct from the invoice value (which in this case included freight and other expenses) the damaged value has been uniformly applied * * *

Apart from the uniform authority to the contrary, it would seem at least doubtful whether the method now contended for is consistent with the wording of the clause in question which requires claim to be 'adjusted and settled * * * on the net invoice cost plus disbursements'."

The following citations of computations under such a clause are illustrative:

Gulf Colorado &c Ry. v. Texas Packing Co., supra (pp. 36, 37):

"The testimony showed that the invoice price of the poultry at Temple to the Packing Company was $22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. That sum was the *bona fide* invoice price to the consignee, which the bills provided was to be the basis of recovery in

case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See Pennsylvania R. R. Co. v. Olivit Bros., 243 U. S. 574."

Pennsylvania R. R. Co. v. Olivit Bros., supra, (p. 586):

"As plaintiff further says, to recover the damages sustained by it based upon this value, [the invoice value] plaintiff must receive from defendant the difference between this value and the proceeds of the sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Pearse v. Quebec Steam-Ship Co., 24 Fed. 285, (p. 289):

"Where there is a partial injury, therefore, the damage is to be computed upon the basis of the invoice value of the goods damaged, because the invoice value is the extent of the value for which the carrier assumes responsibility. Whatever is realized for the damaged goods must therefore be credited upon the invoice value, the same as though the goods were abandoned to the carrier, and the sale of the damaged goods were made by him. In that case he would pay the invoice value, and would receive the proceeds of the damaged goods. * * * The result is that the libelant is entitled to $386.20, the diffeernce between the invoice value of the goods damaged and freight, and the net proceeds of the sale of them, together with interest and costs, for which judgment may be entered."

Appellants contend that the construction outlined in the second question clearly violates the rule of *The*

Ansaldo case. To assent to this proposition would do violence to the express holding of this Court in that case. This Court in effect outlined the method of computation under such a clause. It was said (p. 497):

> "The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. *Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time.*"

This language leads to only one conclusion, *i. e.*, that the fluctuations in the value of damaged merchandise between the time of shipment and the time of sale may result in a substantial advantage to the shipper or to the carrier. They are on an equal footing and therein lies the *quid pro quo* which is the basis of this contract.

Certainly the fact that the damaged value could, because of a *great* rise in market value, approximate the invoice value is merely a matter of simple arithmetic. It must be assumed that this Court contemplated that possibility and yet indicated no limitation to the application of this rule. This contingency was recognized and approved in The Lydian Monarch 23 Fed., 298, at page 300, the court saying:

> "The amount due must be adjusted upon the above principle of computation, and if it should turn out that the libelant has received from the sale of the damaged goods the invoice price, after deducting the costs of importation, sale, etc., the libel will be dismissed."

This then is sufficient answer to appellants' contention that there was not a consideration of this point in this case and all other cases discussing the validity of an invoice cost valuation clause.

It has been demonstrated by examples set forth under Point I, that this clause operates for the protection of the shipper as well as the carrier. The illustration which assumed a fall in market value to a point below the invoice cost is not an abstract nor fanciful indulgence in figures, as the following cases show:

Crutchfield & Woolfolk v. Hines, Sup. Jud. Ct. of Mass., 131 N. E. 340. There, a shipment under a bill of lading containing a clause substantially the same as the one in question was involved. The invoice cost at the time and place of shipment was $963.85. During transit there was a collision and the goods were totally destroyed. At the time of the collision the market value had depreciated to $500. Suit was instituted to recover the full invoice value under the bill of lading clause heretofore mentioned. The defendant, *a rail carrier,* made the contention that under the second Cummins Amendment, this clause was void, and because thereof, the shipper was entitled to recovery on the basis of market value. The Court upheld this contention and awarded $500. Conversely if the carrier had been a vessel, full invoice value would have been recovered.

In *The Cardiganshire,* 9 F. (2d) 416, the sound market value of the goods was $2.50 per unit, whereas the invoice value was $2.80. There was an invoice value clause in the bill of lading but the libellant failed to prove sufficiently the invoice value and early in the case contended for mar-

ket value, apparently under the mistaken belief that the market value was higher than the invoice value. The Court awarded the market value and the consignee thereby had to take thirty cents per unit less than he would have been entitled to under an accepted invoice cost valuation clause.

Such a situation was contemplated by this Court in *The Ansaldo, supra,* when it said:

> "Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier * * *"

And as said by the District Judge in *The Ansaldo, supra:*

> "It guards the parties against fluctuations in the market while the goods are in transit."

It does also eliminate the "variable factor of the market value," as suggested by the District Judge in this case. It fixes beforehand a basis upon which to base damages and leaves nothing to speculation or variation. It is peculiarly applicable to those cases where there is no established market value for the commodity at the place of arrival. It is a fair, just and feasible method of computation *and has been recognized and applied in every reported case in which such a clause was involved*— and the intention of the parties must necessarily have been so to contract.

Third Point.

THE TRUE MEASURE OF DAMAGES UNDER AN INVOICE COST VALUATION CLAUSE IS NOT DETERMINED BY THE APPLICATION TO THE INVOICE VALUE OF THE PERCENTAGE OF LOSS BASED ON THE DIFFERENCE BETWEEN SOUND VALUE AND DAMAGED VALUE.

THE THIRD QUESTION SHOULD BE ANSWERED "NO".

Appellants' contention that the rule interrogatively stated in Question 3 of the Certificate is the "true rule", is at variance rather than in accord with the following language of this Court in *The Ansaldo, supra,* which reads:

> "Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, and may lessen the carrier's normal liability if they should appreciate prior to that time." (p. 497).

Their examples at pages 30-31 of their brief disregard this language of the Court for the reason that under it no amount of fluctuation in the market price during the interval above named can possibly result in a variation in the dollar and cents recovery. It is stated at p. 29 of Appellant's brief in support of their contention that

> "The cargo owner will be entitled to recover and the shipowner will be required to pay only a given amount for the same percentage of loss, whether the market value for sound goods has risen or fallen and whether the value of the damage goods is less or more than their invoice value."

If appellants' interpretation is correct, then the above language of this Court is meaningless. There cannot possibly be a benefit to either the carrier or the shipper depending upon depreciation or appreciation in price. In

appellants' examples at pp. 30-31, the shipper would receive the identical sum of $3.90 per ton as his recovery.

On the other hand, the District Court followed the *exact* language of *The Ansaldo* case in making the computation of damages (22 Fed. Supp. 743 & 744). Under the District Court's construction the actual value of the damaged fish meal *per freight unit* was first obtained viz: $25.00 per ton, and then the difference between that sum and the invoice value of $32.50 per ton was awarded. Under this interpretation the result stated by this Court is achieved for the reason that had the price of fish meal depreciated the shipper would have benefited, and had the price of the fish meal appreciated the carrier would have benefited.

Under the present clause, as the trial judge (Chesnut) found and as *The Ansaldo* case demonstrates, both the shipper and the carrier are on an equal footing for the reason that only the invoice value of sound cargo and damaged values of the *damaged units* are considered. Either may have the advantage of a rise or fall in the market, but in the final analysis the shipper is always protected against *actual loss.* The invoice value plus disbursements represents the amount of money the shipper has paid for the goods. If the value of the damaged merchandise equals or exceeds the invoice value of the goods the shipper has sustained no actual loss. He is reimbursed by the ship up to that sum. If, however, the market went down after shipment, but before delivery, the shipper would still be reimbursed on the basis of what he actually paid for the goods and although the market price of sound merchandise may then be considerably lower than the invoice value his loss would still be computed on the basis of the latter.

The lower Court's interpretation of the clause the *does not* give the carrier complete exemption from liabi ity for losses caused by its negligence, as stated by th appellants at various places in their brief and pa ticularly at page 27! It merely fixes the amount fo which the carrier, in case of negligence, shall be liabl The leading case on this subject is *Hart v. Pennsylvani Railroad,* 112 U. S. 331, 5 Sup. Ct. 151, decided some fift four years ago, where the Court stated in refutation o the same argument as is here presented, at page 156:

> "The limitation as to value has no tendency to e empt from liability for negligence. It does not in duce want of care. It exacts from the carrier th measure of care due to the value agreed on. Th carrier is bound to respond in that value for negl gence. The compensation for carriage is based o that value. The shipper is estopped from sayin that the value is greater. The articles have no grea er value for the purposes of the contract of trans portation between the parties to that contract. Th carrier must respond for negligence up to that valu It is just and reasonable that such a contract, fairl entered into, and where there is no deceit practice on the shipper, should be upheld. *There is no vi lation of public policy. On the contrary, it woul be unjust and unreasonable, and would be repugna to the soundest principles of fair dealing and of th freedom of contracting, and thus in conflict with pu lic policy, if a shipper should be allowed to rea the benefit of the contract if there is no loss, and t repudiate it in case of loss.* This principle is not new one."

The appellants have argued at length that such a co struction of the invoice value clause as was made by th Court below does not remove the fluctuations of mark

value from calculation of damages. Although the market value of the damaged goods is a factor in thus computing the damages it enters into the computations solely as a means of measuring the *actual* loss and the real evil of market value fluctuations, measuring anticipated profit rather than actual loss, is unquestionably removed by the operation of the invoice value clause as it has hitherto been construed. This we think is what the Court meant as well as the parties to the contract and *is a distinction with a difference.* These reasons are long established and have received the sanction of judicial utterance. The Court in *The Oneida,* 128 Fed. 687, C. C. A. 2nd Circuit, in speaking of the reason behind such a valuation clause stated at p. 692:

> "The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily."

Appellant claims that the rule contended for is applied in the cases of marine insurance on cargo and general average, referring to:

(1) Rule 16 of the York Antwerp Rules, 1924, *dealing with general average.*

(2) Rudolph in his book on the York Antwerp Rules, page 102.

(3) British Marine Insurance Act 1906, Section 71 (3).

(4) Arnould on Marine Insurance, page 1314.

(5) Winter on Marine Insurance, page 341.

It will be noted that in none of the above references is the question of *method* of computation of damages as between a *ship owner* and *shipper and/or consignee* dealt with. Whatever may be the rule with respect to general average under the York Antwerp Rules or a valued cargo marine insurance policy, it is peculiar to that field. The District Judge considered his method of calculation, as made in his opinion, to have been uniformly applied in the cases to which he referred. (22 Fed. Supp. at 743.) Such assumption seems well justified, in view of the universal application of the rule over a long period.

Appellants in their brief have not cited a single case involving a suit between a cargo owner and a vessel for damage to such cargo in which their suggested rule has been applied. In fact, said Judge Chesnut, "• • • it is frankly admitted by counsel that this method of calculating damages has never heretofore been applied by any Court in a case dealing with a clause submitting [substituting] invoice value, for market value • • • on the contrary it is my understanding that the calculation as made in the opinion, which was to deduct from the invoice value which in this case included freight and other expenses) the damaged value has been uniformly applied." (22 Fed. Supp. at 743.)

It does not seem logical or wise that a rule universally applied heretofore should be now disregarded! Appellants' contentions are unique and what was said by the Court in *International Navigation Co. v. The Atlantic Mutual Insurance Co.*, 100 Fed. 304, in disposing of contentions made there that the rule applicable to valued marine insurance policies should apply as well to partial losses in the case of hull insurance is pertinent (p. 318):

> "The defendants contend that the same rule is to be applied to all partial losses upon a ship. If this

contention is sound, it is remarkable, considering the long continuance and frequency of valued policies on vessels and of partial losses thereon, that no such rule should appear in the text-books and adjudications, but on the contrary a distinct recognition of the difference in this regard between ship and goods."

An exhaustive search of the authorities on this point, including but by no means confined to the cases cited in the Court's opinion, reveals but two instances in which the shipper attempted to have applied the rule applicable to recoveries under valued cargo marine insurance policies. The earlier case was that of *Duplan Silk Co. v. Lehigh Valley R. Co.*, 223 Fed. 600, C. C. A. 2nd Circuit. Judge Hough's statements, then District Judge and well remembered as one of our ablest admiralty judges, are unanswerable. He said in disposing of similar contentions in the District Court, at p. 602:

> *"I cannot see that there is any moral principle involved in either method of computation; the question is: What contract was made?* In my judgment the United States courts have held that, when a valid, fair valuation contract has been made, the articles shipped 'have no greater value, for the purposes of the contract of transportation, between the parties to the contract; * * * the shipper is *estopped* from saying the value is greater.' Hart v. Pennsylvania Railroad Co., 112 U. S. at page 341, 5 Sup. Ct. at page 156, 28 L. Ed. 717. *This is a simple and fair rule, and if the shipper cannot even refer to any greater value than the conventional value, then, of course, there is no basis for the sort of computation sought to be made by the libelant herein."*

Judge Lacombe, speaking for the Circuit Court of Appeals, said at pp. 603, 604:

"Examination of the claim shows that it is based on the theory that the rule to be applied in calculating loss is the same as would be applied when computing a particular average loss under a policy of marine insurance. But this *is not* an insurance case: it is a case of carriage under a bill of lading. The question presented is: What is the meaning of two clauses in the bill of lading, both lawfully included in the bill." (p. 603.)

"As in all other controversies arising upon written contracts, the fundamental question is: *What does the contract provide?* That the method of calculation provided may not be as equitable as the method of calculation provided under some other contracts—*e. g.*, under policies of marine insurance—is not important, *the question is whether the parties have agreed on that method.*

The printed clause provides that the loss or damage shall be *computed* on the *basis* of the *real value* of the property, *unless* a lower one has been agreed upon, in which event such lower value shall be the 'maximum amount to *govern such computation*'."

The second instance will be found in *The Ansaldo* decision in the District Court, where the Court refused to apply the "percentage theory," but instead gave the clause effect in accordance with the Appellee's contentions.

Similarly, in the case of *Pearse v. Quebec Steamship Co.*, (1885) 24 Fed. 285 at 287 Judge Brown refused to apply an insurance measure of computing damages (free from average unless general) in a cargo damage case where suit was brought on a bill of lading but followed the same rule as contended for by the Appellee here.

Caution should always be exercised in transporting a rule of law from one subject to another.

Duplan Silk Co. vs. Lehigh Valley R. Co., 223 Fed. 600
Pearse vs. Quebec S. S. Co., 24 Fed. 285.
International Nav. Co. vs. The Atlantic Mutual Ins. Co., 100 Fed. 304.

Particularly is this true where the inquiry is directed, as in the present case, to the *intent* of the parties. The intent of the parties is *solely* to be determined, and this could have been directed only to the universal and unvarying operation of the clause.

As the District Court found: "in operation the clause only eliminates prospective profit, and limits the damage to the owner's *actual loss* in the transaction" (22 Fed. Supp. 742).

Although the Courts have, on occasion, decided that similar construction should be given similar language in a policy of marine insurance and in a bill of lading, *no Court has decided that the settlement of losses under them should be similarly computed.* In fact, there is no similar language in this respect. The specimen forms of marine insurance policies set out in Winter on Marine Insurance and Arnould on Marine Insurance and Average, contain no clause regulating the computation of any loss thereunder. It will not be doubted that, in the absence of a damage measure clause in a bill of lading, the damages would be computed upon an entirely different basis than under a marine insurance policy, namely, the basis would be the difference between the sound and damaged value at the time and place of arrival. That is because so judi- "v

decreed (*St John's N. F. Shipping Corp. v. S. H. Companhia Geral Commercial*, 263 U. S. 119). So far then the analogy fails, for it is seen that, in the absence of controlling clauses, the measures of damage are quite different. If, however, the bill of lading does, as the instant one, define the measure of damages, and if that measure has been construed uninterruptedly and uniformly by awarding the difference between the invoice value and the damaged value, the analogy becomes even more remote. There is then more than custom or practice; there is a contractual measure, which has heretofore been uniformly applied, and which should be consistently enforced.

In our opinion the District Judge correctly stated the law herein involved, when at p. 744 of 22 Fed. Supp., he said:

> "The ordinary calculation of damages due to a carrier's negligence is to deduct the damaged value from the sound value on arrival. The particular clause in consideration merely substitutes the invoice value for market value. If the method of calculating the damages now contended for is adopted, resort must be had to the extrinsic and variable factor of the market value which it was apparently the purpose of the clause to eliminate. The method of calculation used to determine loss or damage under a valued marine insurance policy on cargo (which differs from that on the ship's hull) proceeds on well established principles which do not seem to be here applicable. In view of the well established practice to the contrary, I do not feel warranted in adopting what would be a clear innovation in the method of calculating damages in this case even if it be assumed that the new method now proposed has the advantages

claimed for it. I find nothing expressed in The Ansaldo Case which would seem to require a contrary conclusion."

Respectfully submitted,

GEORGE FORBES,
GEORGE WHITEFIELD BETTS, JR.,
HENRY L. WORTCHE,
Counsel for Appellees.

FRANK J. ZITO,
On the Brief.

Dated at Baltimore, Md., February 1, 1939.

SUPREME COURT OF THE UNITED STATES.

No. 548.—October Term, 1938.

H. V. B. Smith, C. D. Rafferty and H. S. McCormick, Co-partners Trading and Doing Business under the Firm Name and Style of H. J. Baker & Bro., Appellants and Cross-Appellees,

vs.

Motorship "Ferncliff" and Glittre Aktieselskabet and Fearnley & Eger, Appellees and Cross-Appellants.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[March 27, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals, Fourth Circuit, has certified to us the following Statement of Facts and Questions (U. S. C. A. Title 28, sec. 346)—

Statement of Facts.

This was a suit in admiralty to recover damages to shipments of fish meal made in March 1936 [on Motorship Ferncliff] from points in Japan to consignees in Norfolk, Va. and Baltimore, Md. under bills of lading containing the following provision:

"All claims for which the ship and or carrier may be liable shall be adjusted and settled on the value declared by the shipper or on the net invoice cost plus disbursements, whichever shall be the least. The carrier shall not be liable for any profit or consequential or special damages, and shall have the option of replacing any lost or damaged goods."

No lower rate was offered the shipper for the service rendered because of this provision; and no choice of rates with and without the valuation clause was afforded him. The record shows that no value was declared by the shipper on the shipment in question.

The invoice cost of the fish meal was $32.50 per ton. The value of the damaged portion of the shipment upon arrival at the ports of destination was $25.00 per ton. The market value of undamaged fish meal at the ports of destination at the time of the arrival of the shipment was $36.00 per ton.

The court below held the valuation clause valid and compu the damages on the basis of the difference between the invoice c ($32.50 per ton) and the value of the damaged fish meal at the ti and place of delivery ($25.00 per ton). [22 Fed. Supp. 728, 7 742.]

Appellants, while not contending before us that the clause qu is absolutely invalid, contend that in view of the decision in *Ans San Giorgio* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, its validity be sustained only if it be construed as requiring that, in estimat damages, the percentage of loss on the damaged shipment be as tained and applied to the invoice cost. Under this contention, loss here would be determined, not by deducting the value u arrival ($25.00 per ton) from the invoice cost ($32.50 per ton), by ascertaining the proportion of the invoice cost ($32.50) co sponding to the proportion which the actual loss ($36.00—$25.0 $11.00) bears to sound value ($36.00), i. e. by taking 11/36 $32.50. It is pointed out that this is the method used in calculat the amount of loss under a valued marine insurance policy on ca and also the method prescribed by rule 16 of the York-Antw rules for a general average adjustment. And it was stated at bar of the court by counsel for appellant that the same method been generally employed in estimating cargo damage since the cision in *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co., supra.* the time this statement of counsel was made it was challenged opposing counsel and nothing appears in the record with re thereto.

In the absence of the decision in the Ansaldo San Giorgio c we should affirm the decision below on the authority of *Gulf S. F. R. Co.* v. *Texas Packing Co.* 244 U. S. 31, 37; *Penn R. C Olivet Bros.* 243 U. S. 574, 586; *Hart* v. *Penn R. Co.* 112 U. S. *The Californian*, 2 Cir. 82 F. 2d 283; *Duplan Silk Co.* v. *Le Valley R. Co.*, 2 Cir. 223 F. 600; and *The Oneida*, 2 Cir. 128 F. In view of that decision, however, we are divided and in doub to the validity of such a clause as is here involved and as to method which should be employed in computing damages unde Notwithstanding the passage of the Carriage of Goods by Sea of April 16, 1936, c. 229, sec. 4, 49 Stat. 1210, 46 USCA 1304 (5) question as to the correct method of computing damages und valuation clause is deemed an important one, as to which an thoritative decision would seem desirable. We, therefore, res fully certify to the Supreme Court of the United States the lowing questions of law as indispensable to a proper decisio this case:

QUESTIONS.

1. Is an invoice cost valuation clause, such as that here invo inserted in a marine bill of lading without offering a choice of to a shipper, valid and binding upon the parties?

2. If so, should damages to a shipment be ascertained, under such a valuation clause, by deducting the value of the damaged goods in their damaged condition at the time and place of delivery from the invoice cost valuation as fixed by such clause?

3. Or, should the percentage of loss of the damaged goods, based on difference between sound value and damaged value, be ascertained and the percentage applied to the invoice value for the purpose of ascertaining the damage?

Ansaldo San Giorgio, I v. *Rheinstrom Bros. Co.*, 294 U. S. 494, considered and held invalid, because against sound public policy, the following limitation agreement in a maritime bill of lading: "In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred." The opinion did not adjudicate the validity or effect of a clause, such as the one now before us, where the parties adopted "an agreed value as a measure of recovery for loss or damage to goods not delivered by the carrier or damaged in transit", and it does not control the questions here involved.

The clause in question prescribes a measure of recovery rather than limits the amount which may be recovered when loss or damage occurs. For a long time, in the absence of a controlling statute, fraud or imposition, such provisions in bills of lading have been recognized as valid by this and other federal courts. Also by many—perhaps a majority—of the state courts. *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331, 337-340; *Phoenix Insurance Co.* v. *Erie and Western Transportation Co.*, 117 U. S. 312, 322; *Pennsylvania Railroad Co.* v. *Olivit Brothers*, 243 U. S. 574, 586; *Gulf, Colorado & Santa Fe Railway Co.* v. *Texas Packing Co., et al.*, 244 U. S. 31, 37; *The Ellerdale*, 10 Fed. (2d) 53; *The Asuarca*, 13 Fed. (2d) 222, 223; *The Merauke*, 31 Fed. (2d) 974; *Kilthau* v. *International Mercantile Marine Co.*, 245 N. Y. 361, 365; *Coleman* v. *N. Y., New Haven, and Hartford Railroad Co.*, 215 Mass. 45, 49; *Shaffer & Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 21 I. C. C. 8; *In the Matter of Bills of Lading*, 52 I. C. C. 671, 710; Note Lawyers' Reports Anno. 1918B, 720, where the pertinent cases are collected.

Chicago, &c. Ry. Co. v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 98, 99-100, involved the following clause in a bill issued by the railway—"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property

at the place and time of shipment under this bill of lading, including freight charges, if paid." We said—

"Before the passage of this amendment [The Cummins Amendment, Act March 4, 1915, c. 176, 38 Stat. 1196] the Interstate Commerce Commission had upheld the clause in the bill of lading as in no way limiting the carriers' liability to less than the value of goods but merely offering the most convenient way of finding the value. . . . We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily prevent a recovery of the full actual loss, and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule. But the question is how the contract operates upon this case."

The clause was declared inoperative because forbidden by the Cummins Amendment, which did not extend to ocean carriers. *Union Pac. R. R. Co.* v. *Burke*, 255 U. S. 317, 322.

The District Court upheld and applied the agreement, and supported its views by a careful opinion—(22 Fed. Supp. 728, 742-744). It said—

"The clause we are here dealing with does not appear to operate in that way [i.e., 'to relieve the carrier from the consequences of its negligence']. . . . The clause is gratified by determining the amount of the whole tonnage damaged, and multiplying by the damage per ton. . . . In operation the clause only eliminates prospective profit, and limits the damage to the owner's actual loss in the transaction. It may even operate to his advantage if the market value at destination is less than the invoice value. In my opinion the clause is therefore different in its operation and effect from that condemned in the Ansaldo case. [294 U. S. 494.]

"In the Ansaldo Case two general types of valuation clauses were considered, one described as a 'true limitation agreement' and the other as a 'true valuation clause.' The one involved in this case would seem to fall in the latter category. . . . I take the view after reading the cases specially cited in the opinion and other consideration of the subject, that the clause as here worded is not against public policy and should be given effect. . . . The general rule of our law is freedom of contract, subject only to statute and considerations of the public interest. Where a contract stipulation is not clearly opposed to public policy it should be upheld as it is the agreement of the parties. The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5), 46 U. S. C. A. § 1304(5).

. . . . . .

"Assuming the validity of the bill of lading clause that claims against the carrier shall be adjusted and settled on the net invoice

cost plus disbursements . . . it is now contended that the proper method of calculation is to first determine what was the percentage of damage or loss, and then apply this percentage to the invoice value.

. . . . . .

"Counsel for the libelants point out that this is the method of calculating the amount of loss under a *valued marine insurance policy on cargo.* . . . It is frankly admitted by counsel that this method of calculating damages has never heretofore been applied by any court in a case dealing with a clause submitting invoice value for market value. On the contrary it is my understanding that the calculation as made in the opinion, which was to deduct from the invoice value (which in this case included freight and other expenses) the damaged value has been uniformly applied."

. . .

We think the District Court reached the correct conclusion in respect of the mooted clause upon adequate authority and reasoning.

To the first certified question, we reply, Yes where there has been no fraud or imposition; to the second the answer is, Yes; to the third, No.

A true copy.

Test:

Clerk, Supreme Court, U. S.